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WHATEVER HAPPENED TO THE RIGHT TO TREATMENT?: THE MODERN QUEST FOR A HISTORICAL PROMISE

*Paul Holland**
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Since the creation of the first juvenile court in 1899,¹ state training schools have been the primary place of confinement for children removed from their homes.² Although the rhetoric of the Progressive Reformers created an impression that children placed out of their homes by juvenile court judges would reside in pleasant cottages staffed with benevolent substitute parents, most children lived in large impersonal institutions. The cause of their removal from their homes was irrelevant. Delinquent children, status offenders, and neglected children were placed together with a promise of care and rehabilitation.³ Notwithstanding their idyllic-sounding names⁴ and their laudatory purposes, the institutions have historically been understaffed, unhealthy, and devoid of rehabilitative programming. Many were, and some continue to be, extremely dangerous places for children. By the time the "children's rights revolution" began in the 1960s, it was clear to any observer that the promise of the juvenile court had never been fulfilled. Indeed, the United States Supreme Court stated in 1966 that "[t]here is evidence . . . that the child receives the worst of both worlds: that he gets neither the protec-

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1. In 1899, Illinois enacted the Juvenile Court Act which provided that the court was to afford the child "the care, custody and discipline" which would "approximate as nearly as may be that which should have been given by its parents." 1899 Ill. Laws 131.

2. Although status offenders and neglected children are seldom placed in state training schools today, institutions remain the primary placement for delinquent children. See 42 U.S.C.A. §§ 5663(a)(12)(A), 5667(b)(2)(G) (West Supp. 1995) (requiring states receiving federal grants to have programs which do not place neglected children or status offenders in detention or correctional facilities).

3. For a historical analysis of treatment practices in the training schools, see DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE, THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980).

4. When one of the authors began practicing law in the District of Columbia, the institutions were called Oak Hill, Maple Glen, and Cedar Knoll. As a result of litigation, two have been closed, and the remaining one is operated with a monitor.

tion accorded to adults nor the solicitous care and regenerative treatment postulated for children."⁵

Between 1972 and 1982, in an effort to ameliorate wretched institutional conditions, advocates for children filed suits in state and federal courts arguing that children confined in state training schools had both a statutory and constitutional "right to treatment." Although the cases produced few court opinions, the litigation induced many state and county governments to improve the conditions in state training schools.

The proponents of a right to treatment asserted that if a state takes custody of a child for a rehabilitative purpose, it must provide treatment to effectuate that rehabilitation. This assertion had historical validity. The rehabilitation of wayward children was the goal of the Progressive Reformers who led the juvenile court movement.⁶ The Progressives sought the creation of a juvenile court which would act as *parens patriae*, that is, "parent of the country."⁷ In the Progressives' view, the juvenile court judge was not to adjudicate and sentence the youth, but was to identify the conditions which had led him astray and to "treat" him for those conditions.⁸ The treatment provided would be guidance and care to steer the youth away from a life of crime and immorality.⁹ Thus, the original and subsequent juvenile court statutes promised that children who were removed from their families by a judge

5. *Kent v. United States*, 383 U.S. 541, 556 (1966) (citing Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 12 (1965); David R. Barret et al., Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 775 (1966)). For congressional material attesting to the impossible burden placed on juvenile court judges, see *Mr. McMillan, Amending the Juvenile Court Act for the District of Columbia*, H.R. REP. NO. 1041, 87th Cong., 1st Sess. V.6 74,351 (1961); *Mr. Hartke, Providing for the Appointment of Two Additional Judges for the Juvenile Court of the District of Columbia*, S. REP. NO. 841, 87th Cong., 1st Sess. V.5 72,007 (1961); *Mr. Hartke, Providing for the Appointment of Two Additional Judges for the Juvenile Court of the District of Columbia*, S. REP. NO. 116, 86th Cong., 1st Sess. V.1 34,006 (1959).

6. See Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Status: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 487 (1995) (crediting Progressive Reformers with founding juvenile court system and claiming that rehabilitation was exclusive emphasis in designing separate system).

7. Doubts about the doctrinal soundness of importing this chancery concept into a new court designed to address unlawful behavior have arisen in retrospect but have in no way undermined its vitality as a basis for juvenile court jurisdiction. See *In re Gault*, 387 U.S. 1, 16-18 (1967) (reviewing rationale leading to *parens patriae* doctrine and finding unsatisfactory the results from that doctrine); ANTHONY M. PLATT, *CHILD SAVERS: THE INVENTION OF DELINQUENCY* 152-63 (2d ed. 1977) (discussing two ideological perspectives criticizing juvenile court system).

8. See Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119 (1909) (advocating importance of judges in juvenile cases who are "willing and patient enough to search out the underlying causes of the trouble and to formulate the plan by which, through the cooperation, oftentimes, of many agencies, the cure may be effected").

9. *Id.* at 119-20. Mack, an early proponent of juvenile courts, stated most clearly the philosophy of the court. In explaining why the court should not concern itself with issues of guilt or innocence, Mack said the juvenile court should be concerned with "[w]hat is [the child], how has he become what he is, and what had best he done in his interest and in the interest of the state to save him from a down-ward career." *Id.*

would receive the care, custody, and discipline that their parents should have provided.¹⁰

Relying on the historical promise of the juvenile court and on contemporary cases concerning mental health facilities, judges began to rule that children sent to a state training school had a right to treatment.¹¹ The rulings were based on the purpose clauses of state juvenile codes, the substantive and procedural prongs of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Cruel and Unusual Punishment Clause of the Eighth Amendment.¹² Although some courts began to question the existence of the right as early as 1973,¹³ the doctrine sustained litigation against state institutions for juveniles throughout the 1970s.¹⁴

In 1983, the United States Supreme Court wrote its only opinion about the right to treatment in the case of *Youngberg v. Romeo*.¹⁵ Although this case involved a challenge to the training program in a mental retardation facility, it has affected litigation in the juvenile justice context as well. Similarly, cases beginning with *Rhodes v. Chapman*¹⁶ and continuing through *Farmer v. Brennan*,¹⁷ which curtailed the scope of the Eighth Amendment in prison conditions cases,¹⁸ have also had an effect. These opinions have dras-

10. See, e.g., 1899 Ill. Laws 131 (stating that purpose of Juvenile Court Act was to provide "the care, custody and discipline of a child" which would "approximate as nearly as may be that which should have been given by its parents").

11. The first case to suggest a right to treatment was *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1367 (D.R.I. 1972) (enjoining defendants from practices which were anti-rehabilitative because they violated juveniles' equal protection and due process rights). In *Martarella v. Kelley*, 349 F. Supp. 575, 600 (S.D.N.Y. 1972), the court more explicitly upheld the right to treatment by stating that "[a] new concept of substantive due process is evolving in the therapeutic realm Its implication is that effective treatment must be the *quid pro quo* for society's right to exercise its *parens patriae* controls." *Id.* at 600 (quoting Nicholas N. Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 851-52 (1969)).

12. See, e.g., *Nelson v. Heyne*, 355 F. Supp. 451, 459 (N.D. Ind. 1973) (holding that right to treatment is guaranteed by Indiana law and United States Constitution), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

13. See *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973) (holding that due process does not guarantee right to treatment).

14. Cases continue to be filed even today but far less often than in the earlier period.

15. 457 U.S. 307 (1982). The Court held that the respondent, who was profoundly retarded and confined to a state mental facility, had a constitutionally protected interest in "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319, 324. Previously, in 1975, Justice Burger had referred to the legal weakness of the arguments supporting the right in his concurring opinion in *O'Connor v. Donaldson*, 422 U.S. 563, 587-89 (1975) (Burger, J., concurring).

16. 452 U.S. 337 (1981). The Court held that "double celling," which is putting two prisoners in the same cell, did not violate the constitutional protection against cruel and unusual punishment. *Id.* at 349.

17. 114 S. Ct. 1970 (1994).

18. *Id.* at 1984. In *Farmer*, a transsexual was housed with the general prison population. The Court held that "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."

tically limited the prospects for constitutional relief for children residing in institutions.

While some of the most egregious abuses described in the pleadings and opinions of the 1970s have abated, many training schools remain ill-equipped to provide children living in them with the education, behavior modification, counseling, substance abuse treatment, and the mental and physical health care they need. The laws of most states still promise such care. In recent years, however, a wave of legislation increasing the severity with which children who break the law are treated has compromised that promise. Legislatures have introduced punishment into juvenile codes, authorized mandatory minimum commitments in the juvenile justice system, and expanded the possibilities for prosecuting children in criminal courts. Some juvenile courts now have the power to impose a criminal sentence as part of a juvenile disposition, with the criminal sentence stayed—either temporarily or permanently—depending upon the youth's performance during the course of the juvenile disposition.¹⁹

In the face of this ferment, we write this article with several purposes. We seek to reassess the constitutional right to treatment doctrine, test its continued validity in light of recent judicial opinions and legislative changes, and suggest a different formulation of a state's obligation toward delinquent children in its care. In so doing, we show that although changes in statutes and judicial opinions will affect the lives of institutionalized children, the far greater cause for concern is the repeated failure of governments to allocate resources to effective rehabilitative programs. We will also demonstrate that even in the harsher juvenile justice system wrought by modern legislatures, states remain obligated to provide institutionalized children with a program of care and services that will assist their development. Despite the current trend, state laws preserve their original rehabilitative goals and form the heart of delinquent children's right to receive such care and services. Simply put, states are obligated to serve as the substitute parents they promise to be. They are responsible, along with parents, for ensuring that the children in their care master the identifiable skills needed to develop into responsible and productive adult citizens. This understanding of the state's role accommodates appropriate punishment and accountability alongside care and rehabilitation. Although courts can play a role in overseeing the provision of these services and in enforcing children's rights to receive them, decisions made by communities serving as parents will ultimately determine the life chances of delinquent children.

19. See MINN. STAT. ANN. § 260.126; TEX. FAM. CODE § 54.04(d)(3). These two statutes differ significantly. Under the Minnesota law, the adult sentence is not imposed unless the youth commits a new offense or otherwise violates the juvenile order. Under the Texas law, the court can order the youth transferred to serve out the adult sentence without making such a finding. The Virginia legislature recently passed a bill similar to the Minnesota scheme. See Peter Baker, *Bill Takes Hard Line on Youth Crime*, WASH. POST, Feb. 1, 1996, at A1.

I. EARLY RIGHT TO TREATMENT THEORIES

The notion of a right to treatment can be traced to the historic ideals of the juvenile court movement.²⁰ Progressive Reformers in the late nineteenth century reconceptualized the manner in which society would treat youthful offenders.²¹ The Positivist criminology underlying the first juvenile court in Illinois and all subsequent juvenile court statutes rejected the notion of free will and sought the causes of delinquency elsewhere. Believing that children lacked both the intellectual and moral capacity of adults and that they were heavily influenced by external pressures resulting from poverty and neglect, the Reformers sought to change behavior "not through threats of punishment, but by changing the youths' thinking, goals, and values."²² Thus, rehabilitation, that is, "treatment services designed to help the child learn to cope with negative external influences in non-delinquent ways,"²³ replaced punishment. This treatment criminology "borrowed both methodology and vocabulary from the medical profession; pathology, infection, diagnosis, and treatment provided popular analogues for criminal justice professionals."²⁴ To both the founders of the juvenile court movement and to the supporters of the juvenile court in the 1970s, this model and its philosophic underpinnings permit the court to do away with formal legal procedures in exchange for treatment leading to rehabilitation. Although cases such as *Kent v. United States*²⁵ and *Schall v. Martin*²⁶ recognized the imperfection of the court and its failure to accomplish its goals,²⁷ the basic promise of rehabilitation has remained intact.²⁸

20. The story of the creation of the juvenile court has been told often and needs little elaboration here. See, e.g., ROTHMAN, *supra* note 3, at Ch. 6 (providing historical overview of beginning of juvenile court); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Difference It Makes*, 68 B.U. L. REV. 821, 822 n.4 (1988) (providing articles regarding history of juvenile court movement).

21. In reality, "offenders" could be children who violated the law, or merely status offenders or children without proper homes.

22. Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offenders Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 482 (1995).

23. *Id.*

24. Feld, *supra* note 20 at 824; see also PLATT, *supra* note 7 at 141-42 (describing juvenile court movement as "anti-legal" with role of judges becoming more like that of "doctor-counselor" or "judicial-therapist").

25. 383 U.S. 541 (1966).

26. 467 U.S. 253 (1984).

27. See *Kent*, 383 U.S. at 556 (expressing concern that "the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children"); *Schall*, 467 U.S. at 263 (stating that Court has attempted to respect informality and flexibility of juvenile proceedings and at same time ensure that juvenile is afforded due process).

28. Even new statutes recognizing punishment and accountability recognize the rehabilitation purpose. See *infra* section IV for a discussion of statutes that provide for rehabilitation.

The harsh reality of juvenile court, condemned by the United States Supreme Court in *Kent*²⁹ and *In re Gault*³⁰ spawned a cadre of lawyers and scholars who attacked the operation not only of the court, but also of the reformatories and training schools where children were sent for treatment.³¹ Seeking a legal basis to challenge the conditions of confinement, lawyers for children returned to the roots of the juvenile court movement, combined the rehabilitative ideal with emerging constitutional doctrines from cases challenging the lack of rehabilitation services in mental health facilities, and developed a constitutionally based right to treatment for children adjudicated delinquent³² in the juvenile court.³³ Although the number of cases reported was small,³⁴ the reasoning in these opinions formed the basis of numerous

29. See *Kent*, 383 U.S. at 556 (stating that juvenile proceedings are often arbitrary).

30. See *In re Gault*, 387 U.S. 1, 17-19 (1967) (stating that juvenile court system often results in unfair, inefficient, ineffective, and arbitrary proceedings).

31. See ROTHMAN, *supra* note 3, at 261-89 (describing conditions that prevailed in institutions between 1899 and 1960s).

32. Plaintiffs in these law suits were also status offenders and neglected children. Throughout the remainder of this article, the term "delinquent" will be used to include all children housed in training schools even though the term may be imprecise in a particular case.

33. Several academic commentators also supported changes to the conditions of confinement. See generally Lewis Kapner, *Juvenile's Right to Treatment—the Next Step*, 47 FLA. B.J. 228 (1973) (reviewing changes in procedure and individualized treatment for juveniles); Kittrie, *supra* note 10 (contrasting ideals upon which juvenile court was founded with contemporary reality and arguing that a true right to treatment will remain unrealized until accepted by legislatures, executives, and public); Michael H. Langley et al., *The Juvenile Court and Individualized Treatment*, 18 CRIME & DELINQ. 79 (1972) (discussing study that concluded that juvenile court system continued to rely heavily on pre-trial detention and did not provide legal representation for juveniles at hearings even in light of *Gault*); Dominic Lasok, *The Treatment of the Young Offender*, 116 NEW L.J. 209 (1965) (detailing considerations of the family in legislation and changing from criminal to civil system); Paul D. Lipstitt, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, 49 B.U. L. REV. 62 (1969) (discussing importance of need for appropriate screening of juvenile cases and development and implementation of innovative treatment programs); Carl P. Malmquist, *Juvenile Detention: Right and Adequacy of Treatment Issues*, 7 LAW & SOC. REV. 159 (1972) (questioning argument that rationale for juvenile detention is treatment); John P. Pyfer, *Juvenile's Right to Treatment*, 6 FAM. L.Q. 279 (1972) (reviewing procedural and substantive rights of juveniles); Donna E. Renn, *The Right to Treatment and the Juvenile*, 19 CRIME & DELINQ. 477 (1973) (examining theoretical basis, legal foundations, and application of juveniles' right to treatment); Albert W. Silver, *Retooling for Juvenile Delinquency Prevention and Rehabilitation in Juvenile Courts*, 30 FED. PROB. 29 (1966) (identifying conditions inherent in juvenile court systems which hamper their effectiveness in two of America's largest cities); Patricia M. Wald & Lawrence H. Schwartz, *Trying a Juvenile Right to Treatment Suit: Pointers and Pitfalls for Plaintiffs*, 12 AM. CRIM. L. REV. 125 (1974) (explaining practical aspects of right to treatment); Mayer N. Zald & David Street, *Custody and Treatment in Juvenile Institutions*, 10 CRIME & DELINQ. 249 (1964) (analyzing organizational patterns and problems of juvenile correctional facilities with regard to their goals of providing custody and rehabilitation); William S. Bailey & John F. Pyfer Jr., Note, *Deprivation of Liberty and the Right to Treatment*, 7 CLEARINGHOUSE REV. 519 (1974) (discussing aspects of juvenile justice institutionalization and treatment).

34. See generally *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977) (challenging conditions of confining delinquents on Eighth Amendment grounds); *Peña v. Division of Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976) (challenging conditions of confinement including use of isolation, hands and feet restraint, and tranquilizers on Eighth Amendment grounds), *aff'd*, 708 F.2d 877

lawsuits and threats of lawsuits seeking to improve the physical conditions and rehabilitation programs in many juvenile treatment centers.

Right to treatment cases were of two types. The first type involved basic concepts of human decency. For example, the cases of *Nelson v. Heyne*,³⁵ *Morgan v. Sproat*,³⁶ *Peña v. Division of Youth*,³⁷ and *Morales v. Turman*³⁸ involved challenges to institutional conditions such as the use of corporal punishment, disciplinary isolation, mechanical restraints, tranquilizers and tear gas, in addition to inadequate medical and dental care, invidious discrimination based on race and national origin, and overcrowding.³⁹ The second type of claim challenged the failure of the juvenile justice system's treatment regimen to live up to its quasi-medical pretensions. Plaintiffs attacked the lack of services, such as psychiatric and psychological treatment, group and individual counselling, health care, and education, that would be required in an effective rehabilitation program. Such quasi-medical claims were litigated

(2d Cir. 1983); *Santiago v. City of Philadelphia*, 72 F.R.D. 619 (E.D. Pa. 1976) (challenging conditions including corporal punishment, solitary confinement, denial of adequate education and rehabilitation, and racial segregation on First, Fourth, Fifth, Eighth, Thirteenth, and Fourteenth Amendment grounds); *McRedmond v. Wilson*, 402 F. Supp. 1087 (S.D.N.Y. 1975) (challenging conditions of confinement for "Persons in Need of Supervision" on grounds that failure to provide adequate and appropriate treatment violated rights to due process, equal protection, and protection from cruel and unusual punishment), *aff'd in part, rev'd in part*, 533 F.2d 757 (2d Cir. 1976); *Swansey v. Elrod*, 386 F. Supp. 1138 (E.D. Ill. 1975) (challenging conditions of confining juveniles awaiting adult criminal prosecution on Fourteenth Amendment equal protection grounds and Eighth Amendment protection from cruel and unusual punishment); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974) (challenging conditions on cruel and unusual punishment grounds under state and Federal Constitution), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977) (per curiam); *Baker v. Hamilton*, 345 F. Supp. 345 (W.D. Ky. 1972) (challenging detention of juveniles prior to finding of criminal guilt on Fourteenth Amendment grounds because juveniles were deprived of rehabilitative care and treatment); *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) (challenging confinement of juveniles in adult correctional facilities on Eighth and Fourteenth Amendment grounds); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972) (challenging conditions of confinement of non-criminal juveniles on grounds that it was cruel and unusual punishment, violated rights to due process, and violated equal protection rights because confinement was arbitrary and capricious); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972) (challenging conditions including corporal punishment, use of tranquilizers, solitary confinement, and mail censorship), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Lollis v. Department of Social Servs.*, 322 F. Supp. 473 (S.D.N.Y. 1970) (challenging, on Eighth Amendment and Fourteenth Amendment Due Process grounds, practice of isolating children for long periods of time).

35. 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 353 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

36. 432 F. Supp. 1130 (S.D. Miss. 1977).

37. 419 F. Supp. 203 (S.D.N.Y. 1976), *aff'd*, 708 F.2d 877 (2d Cir. 1983).

38. 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on procedural grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

39. See *Morgan*, 432 F. Supp. at 1155 (challenging lack of dental and medical care); *Peña*, 419 F. Supp. at 204 (challenging isolation, mechanical restraints, and tranquilizers); *Morales*, 383 F. Supp. at 73-75 (challenging physical brutality and abuse, use of tear gas, and racial segregation); *Nelson*, 355 F. Supp. at 454 (challenging corporal punishment, control-tranquilizing drugs, solitary confinement, mail censorship, and religious services).

in *Nelson v. Heyne*,⁴⁰ *Morgan v. Sproat*,⁴¹ *Martarella v. Kelley*,⁴² *Inmates of the Boys' Training Schools v. Affleck*,⁴³ and *Morales v. Truman*.⁴⁴ The lawyers in these cases crafted their arguments with the rhetoric of the Progressive Reformers. Once the pathology, i.e., the commission of the crime, was evident, its cause was to be diagnosed and an individualized treatment plan of programs applied so that a cure, i.e., rehabilitation, could take place. In the various cases, the plaintiffs showed that treatment plans were seldom produced and that little actual treatment was provided. Thus, the cure—rehabilitation—could not take place.

Several legal sources were cited to support the children's claims for relief. For example, judges ruling in early cases like *Creek v. Stone*,⁴⁵ *In re Elmore*⁴⁶ and *Nelson v. Heyne*⁴⁷ found support for the right to treatment in the state juvenile court statutes.⁴⁸ The guarantee of the right to treatment was also found in both the Eighth and Fourteenth Amendments to the Constitution. Two views of the Eighth Amendment prevailed.⁴⁹ Some courts, like that in *Martarella*, believed that a right to treatment existed within the Eighth Amendment.⁵⁰ Others, like the court in *Affleck*, found no right to treatment in the Eighth Amendment but, instead, held that the challenged conditions violated the state constitution's cruel and unusual punishment clause.⁵¹

The Fourteenth Amendment Due Process Clause also provided two bases for the right to treatment. The first, known as the "quid pro quo" theory,

40. *Nelson*, 355 F. Supp. at 354 (challenging use of tranquilizers).

41. *Morgan*, 432 F. Supp. at 1155 (attacking lack of medical and dental care).

42. 349 F. Supp. 575, 585 (S.D.N.Y. 1972) (attacking institutional conditions that constituted punishment, not rehabilitation), *supplemented*, 359 F. Supp. 478 (S.D.N.Y. 1973).

43. 346 F. Supp. 1354, 1357 (D.R.I. 1972) (challenging lack of vocational training, drug-rehabilitation program, and psychiatric counseling).

44. 383 F. Supp. 53, 73 (E.D. Tex. 1974) (challenging lack of medical treatment following tear gas exposure), *rev'd on procedural grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

45. 379 F.2d 106 (D.C. Cir. 1967).

46. 382 F.2d 125 (D.C. Cir. 1967).

47. 355 F. Supp. 451 (N.D. Ind. 1973), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

48. *See id.* at 459 (holding state statute entitles juveniles to right to treatment); *Elmore*, 382 F.2d at 127 (declaring that denial of needed psychological or psychiatric treatment is "substantial complaint" worthy of "appropriate inquiry"); *Creek*, 379 F.2d at 109 (interpreting District of Columbia Code as requiring psychiatric and medical treatment when appropriate).

49. Courts relying on the Eighth Amendment recognized that the Supreme Court had never applied it to the juvenile court. *See, e.g.,* *Ingraham v. Wright*, 430 U.S. 651, 669 & n.37 (1977) (holding that Eighth Amendment was not applicable to paddling of school children).

50. *Martarella v. Kelley*, 359 F. Supp. 478, 481 (S.D.N.Y. 1973). The reasoning is convoluted. The court believed that because children were committed for treatment, holding them without treatment for longer than 30 days would become a cruel and unusual punishment. *Id.* Therefore, the prohibition against cruel and unusual punishment in tandem with the state juvenile code created the right to treatment.

51. *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1366-67 (D.R.I. 1972).

was endorsed by the courts in *Morales*, *Nelson*, and *Sproat*.⁵² This theory states that a juvenile must receive rehabilitative treatment in exchange for receiving fewer procedural protections at a delinquency trial than would an adult in a criminal trial.⁵³ The other Fourteenth Amendment theory used to support a right to treatment was the right to substantive due process. In *Jackson v. Indiana*,⁵⁴ the United States Supreme Court stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."⁵⁵ From this language, the courts in *Sproat*, *Morales*, and other cases declared that treatment—the announced purpose of state custody—must be provided lest that custody devolve into a purely arbitrary exercise of governmental authority over an involuntarily committed juvenile delinquent.⁵⁶

The relief requested in these cases was extensive. Not only did the plaintiffs seek to enjoin abusive practices and control overcrowding, but they sought to tell juvenile corrections officials how to operate viable treatment programs.⁵⁷ In many cases, experts in mental health care, drug treatment, medicine, education, architecture, crime prevention, rehabilitation programming, and accreditation testified not only about the shortcomings of the institutions but about the need to provide specific rehabilitative programs. The testimony concerning the physical dangers in the facilities and their lack of rehabilitative programming shocked the judges,⁵⁸ who responded by issuing

52. See *Morgan v. Sproat*, 432 F. Supp. 1130, 1136 (S.D. Miss. 1977) (stating that due process required that juveniles deprived of full panoply of due process safeguards only be incarcerated for "beneficient rather than punitive reasons"); *Morales v. Turman*, 383 F. Supp. 53, 71 (E.D. Tex. 1974) (asserting that confinement of juveniles only for rehabilitation is quid pro quo for eliminating procedural safeguards of criminal process), *rev'd on procedural grounds*, 535 F.2d 864 (5th Cir. 1976), *aff'd*, 430 U.S. 322 (1977) (per curiam); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972) (balancing lack of procedural right with interests of treating juveniles), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

53. This comparison between criminal and delinquency cases was also used to support an equal protection argument for a right to treatment. See *Rouse v. Chapman*, 373 F.2d 451, 453 (D.C. Cir. 1966) (noting that involuntary commission to mental institution would violate Equal Protection Clause if no treatment provided); *Sas v. Maryland*, 334 F.2d 506, 509 (4th Cir. 1964) (same).

54. 406 U.S. 715 (1972).

55. *Id.* at 738.

56. *Morgan*, 432 F. Supp. at 1135; *Morales*, 383 F. Supp. at 118-19.

57. See, e.g., *Morgan*, 432 F. Supp. at 1148 (enjoining defendant from operating deficient rehabilitation and ordering defendant to submit plan for corrective actions); *Martarella v. Kelly*, 359 F. Supp. 478, 483 (S.D.N.Y. 1973) (finding that court has authority to specify required standards of care in cases involving disadvantaged institutional inmates); *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1374 (D.R.I. 1972) (recommending rehabilitative treatment through vocational training, drug rehabilitation programs, and psychiatric counseling).

58. See, e.g., *Nelson v. Heyne*, 491 F.2d 352, 354 n.3, 356 (7th Cir.) (stating that staff routinely beat juveniles with wooden stick causing one to "sleep on his face for three days, with black, blue, and numb buttocks," and staff injected juveniles with tranquilizers to control behavior), *cert. denied*, 417 U.S. 976 (1974); *Morgan*, 432 F. Supp. at 1138 (stating that juveniles with "discipline problems" were placed in rooms with "no windows, furnishings or slab for sleeping" and only available toilet was a "hole in the floor with a flushing mechanism located outside the cell"); *Martarella*, 359 F. Supp. at 480 (stating that some of facility's plumbing was unusable,

sweeping remedial orders. Monitors were appointed to make independent assessments of agency activities;⁵⁹ buildings were closed;⁶⁰ baseline conditions of confinement were established;⁶¹ disciplinary codes were imposed;⁶² diagnostic and evaluation procedures were required and individualized treatment plans were created;⁶³ staff-inmate ratios were imposed and staff training was required;⁶⁴ the hiring of new medical, mental health, and drug counsellors was ordered;⁶⁵ and educational and vocational training was required.⁶⁶ Agencies were ordered to go to their legislatures to request more money.⁶⁷

The courts continued to monitor these cases for many years, involving themselves in the day-to-day operations of the facilities. Similar results were obtained in many other unreported cases.⁶⁸ Thus, the constitutional right to treatment appeared to provide not only a sufficient legal theory for challeng-

roofs leaked, and plaster was falling off the walls); *Affleck*, 346 F. Supp. at 1359-60 (stating that juveniles were not allowed outside exercise and were provided minimal education and medical care).

59. *District of Columbia v. Jerry M.*, 571 A.2d 178, 181 (D.C. 1990).

60. *See, e.g., Martarella*, 359 F. Supp. at 483 (mandating closure of detention center); *Affleck*, 346 F. Supp. at 1365 (finding conditions deplorable, particularly inhuman solitary confinement cells).

61. *See, e.g., Affleck*, 346 F. Supp. at 1373 (ordering defendant to provide conditions substantially the same as minimal conditions for adult inmates).

62. *See, e.g., Morgan*, 432 F. Supp. at 1134 (ordering provision of procedural safeguards such as prior notice, impartial evidentiary hearing, and new code of rules governing student conduct); *Morales v. Turman*, 383 F. Supp. 53, 84-85 (E.D. Tex. 1974) (ordering juvenile confinement permissible only on determination of "exceptional dangerousness" established by psychological testing and thorough review of juvenile's history), *rev'd on other grounds*, 535 F.2d 993 (5th Cir.), *rev'd*, 430 U.S. 322 (1976).

63. *See, e.g., Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir.) (finding individual treatment plans required due to differing needs for rehabilitation), *cert. denied*, 417 U.S. 976 (1974); *Morgan*, 432 F. Supp. at 1143 (requiring regular procedures to determine progress toward juvenile's treatment objective); *Morales*, 383 F. Supp. at 105 (concluding that juveniles have constitutional right to medical and psychiatric care meeting minimally acceptable professional standards); *Martarella*, 359 F. Supp. at 485 (ordering evaluation taking into consideration factors such as: emotional development, psychiatric history, charges, drug use, development of written treatment plan).

64. *See, e.g., Morgan*, 432 F. Supp. at 1146 (requiring defendants to submit plan for program of pre-service and regular in-service training for staff); *Morales*, 383 F. Supp. at 90 (ordering defendants to hire bilingual personnel and special education teachers and to institute in-service staff training and minimum student-teacher ratios).

65. *See, e.g., Morgan*, 432 F. Supp. at 1157 (ordering minimum medical, dental, and mental health standards and increased staffing to provide emergency and on-going care); *Morales*, 383 F. Supp. at 105 (ordering upgrading of staff to meet minimally acceptable professional standards).

66. *See, e.g., Morales*, 383 F. Supp. at 92 (finding that juveniles must have adequate employability plan including job placement, on-the-job training, and adequate support services).

67. *See, e.g., Morgan*, 432 F. Supp. at 1150 (ordering defendants to report back to court with regard to action taken by state legislature on request for capital improvements).

68. *See Alexander v. Boyd*, 876 F. Supp. 773, 778 n.5 (D.S.C. 1995) (finding few litigated cases challenging juvenile correctional facility conditions because most settled before trial).

ing conditions, but a potent weapon for revamping the entire juvenile justice system.

To recap, throughout the 1970s, four theories—(1) state legislative purpose; (2) procedural due process; (3) substantive due process; and (4) the prohibition against cruel and unusual punishment—formed the bases of a child's right to treatment while residing in a juvenile corrections facility. While some of the theories supporting the right to treatment were questioned as early as 1973⁶⁹ and 1974⁷⁰ in mental health cases and in 1977 in the juvenile justice system,⁷¹ the right to treatment remained a powerful constitutional claim to improve the conditions in juvenile training schools until the early 1980s.

II. THE DEMISE OF THE CONSTITUTIONAL RIGHT TO TREATMENT

The demise of the right to treatment as a basis for improving conditions in juvenile treatment centers came not from a direct assault on the doctrine but from a convergence of judicial resistance to attacks on other systems. In *Youngberg v. Romeo*,⁷² the United States Supreme Court delineated the substantive due process rights that were retained by a profoundly mentally retarded adult who had been involuntarily committed.⁷³ Romeo had claimed a right to safe conditions, freedom from bodily restraints, and minimally adequate habilitation.⁷⁴ Habilitation was defined as training and development of needed skills.⁷⁵ The Court easily acceded to Romeo's first two claims,⁷⁶ but it ruled narrowly on the issue of his right to training.⁷⁷ Recognizing that Romeo's condition precluded release, the Court acknowledged his right to be

69. *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335, 1339-40 (N.D. Ga. 1972) (finding no constitutional right to treatment for the mentally ill), *rev'd*, 503 F.2d 1319 (5th Cir. 1974).

70. *O'Connor v. Donaldson*, 422 U.S. 563, 588-89 (1975) (Burger, J., concurring) (finding no basis to equate "right to treatment" with constitutional right prohibiting confinement without due process).

71. *See Morales v. Turman*, 562 F.2d 993, 997-99 (5th Cir. 1977) (finding no "right to treatment" for juveniles committing acts that would otherwise result in detention if committed by adults).

72. 457 U.S. 307 (1982).

73. Romeo's mother had sought the involuntary commitment of her 33-year-old son. There was no dispute that he was unable to care for himself outside of the facility. He had the mental capacity of an 18-month-old child, could not talk, and could not perform basic self-care skills. *Id.* at 309.

74. *Id.* at 310. Romeo had been injured more than 60 times because of his own violence and violence directed at him. *Id.*

75. *Id.* at 309 n.1.

76. *See id.* at 315-16 (finding constitutional right to safe conditions of confinement and freedom from bodily restraint) (citing *Ingraham v. Wright*, 403 U.S. 651, 673 (1977) (finding right to personal safety); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (finding right to freedom from bodily restraints)).

77. *Id.* at 317 n.19. The Court did not address whether a substantive due process right was based on the state statutory entitlement to care and treatment. *Id.* at 318 n.23. This more sweeping claim had been abandoned at the court of appeals level. *Id.*

trained but endorsed it only as it related to his safety and to his freedom from restraint within the institution.⁷⁸ The Court further limited relief to minimally adequate training⁷⁹ and ordered that the lower courts defer to the judgments of the professionals about what kind of training was necessary.⁸⁰ Finally, the Court saw no need to rule on whether a person involuntarily committed to a state institution had some general constitutional right to training per se.⁸¹

Several lower courts have addressed the right to treatment for persons committed to juvenile training school since *Youngberg* was decided.⁸² In addition to applying the *Youngberg* rationale, courts in those cases have considered the "quid pro quo" theory⁸³ and the *Jackson v. Indiana*⁸⁴ theory as well. The "quid pro quo" theory has not fared well.⁸⁵ Although courts have recognized the procedural differences between juvenile delinquency and adult criminal cases, they have rejected the notion that such differences require that treatment be provided.⁸⁶ They do so because the Supreme Court has ruled that the demands of due process differ in different situations and that the acknowledged distinctions are constitutionally acceptable in juvenile

78. *Id.* at 317-19.

79. *Id.* at 322.

80. *Id.* at 322-23.

81. *Id.* at 321 n.27. The Court did not need to address Romeo's right to training that would have enabled him to live outside the institution because the purpose for the commitment was to provide care he never could have obtained while living outside of the institution. No amount of training would have made his release possible. *Id.* at 317.

82. See *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987) (finding juvenile detainees protected by Fourteenth Amendment right to treatment); *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (holding that confined juveniles retain liberty interests protected by Fourteenth Amendment, including reasonably safe conditions, freedom from unreasonable bodily restraints, and adequate training), *cert. denied*, 460 U.S. 1069 (1983); *Alexander v. Boyd*, 876 F. Supp. 773, 797-98 (D.S.C. 1995) (same); *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) (holding that juveniles have right to be provided with adequate food, shelter, medical care and minimally adequate training); *Hendrickson v. Griggs*, 672 F. Supp. 1126, 1134 (N.D. Iowa 1987) (finding that Iowa legislature intended to confer special benefits upon distinct class of detained juveniles), *appeal dismissed*, 856 F.2d 1041 (8th Cir. 1990); *Doe v. Strauss*, No. 84-C2315, 1986 WL 4108 at *4 (N.D. Ill. March 28, 1986) (holding that juveniles have right to therapy reasonably designed to effect rehabilitation and proper development); *Stamps-Bey v. Thomas*, 618 F. Supp. 1122, 1125 (S.D.N.Y. 1985) (finding legitimate right to treatment under Due Process Clause), *aff'd*, 788 F.2d 5 (2d Cir. 1986); *Santana v. Collazo*, 533 F. Supp. 966, 992 (D.P.R. 1982) (finding no constitutional obligation to provide rehabilitative treatment to juveniles), *aff'd in part, vacated in part*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1985); *State v. S.H.*, 877 P.2d 205, 216 (Wash. Ct. App. 1994) (holding that juvenile offenders have right to adequate treatment under Due Process Clause of Fourteenth Amendment).

83. See *supra* note 53 and accompanying text for a discussion of the "quid pro quo" theory.

84. 406 U.S. 715 (1972). See *supra* notes 54-55 and accompanying text for a discussion of the *Jackson* theory.

85. See *O'Connor v. Donaldson*, 422 U.S. 563, 585-87 (Burger, J., concurring) (finding "quid pro quo" justification defective and inconsistent with Fourteenth Amendment when due process rights not observed during confinement).

86. See, e.g., *Santana v. Collazo*, 714 F.2d 1172, 1177 (1st Cir. 1983) (finding right to treatment not mandated because rehabilitative treatment is not sole legitimate purpose of juvenile confinement), *cert. denied*, 466 U.S. 974 (1984).

court proceedings.⁸⁷ The *Jackson* claim has fared no better. During the 1980s and 1990s, state legislators and the public have emphasized the need to protect the public from delinquent children and to hold children accountable for their criminal behavior.⁸⁸ Legislatures in many states have enacted changes in the purpose clauses of juvenile court statutes. Although one may argue that punishment and societal protection have always been part of the juvenile court,⁸⁹ newer statutes specifically require that the court protect the community while rehabilitating a delinquent child.⁹⁰ Thus, even if "the nature and duration of commitment must bear some reasonable relation to the purpose for which the individual is committed,"⁹¹ incarceration for the protection of the community, a stated purpose of the juvenile court, meets that standard.⁹² Nothing additional by way of treatment is constitutionally required.

Although the *Youngberg* ruling has slowed the filing of right to treatment suits, it has provided some protection to incarcerated children. For example, in *Santana v. Collazo*,⁹³ the court required the territory of Puerto Rico to provide minimally adequate training to avoid the use of unnecessary bodily restraints.⁹⁴ The *Santana* court also used the *Youngberg* Court's con-

87. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (holding that jury trials are not required in delinquency cases).

88. Actually, crimes committed by children have been decreasing for years. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 217 (1993) (finding that 17% of arrests nationally involved persons under the age of 18; 30% involved persons under the age of 21). Violent crime committed by children, however, has increased. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS, PROGRAM SUMMARY 1-2 (1994) (finding increase in violent juvenile crime resulting in increased juvenile caseload).

89. See *Schall v. Martin*, 467 U.S. 253, 264-65 (1985) (finding that juvenile system acts as "preventive detention" by protecting child and society from consequences of juvenile's criminal acts); *McKeiver*, 403 U.S. at 546 n.6 (refusing to abandon juvenile system and finding no cause to adjudicate juvenile offenses in criminal court); *In re Gault*, 387 U.S. 1, 15 (1967) (noting that traditional role of juvenile system was to "treat" and "rehabilitate," not penalize).

90. See, e.g., CAL. WELF. & INST. CODE § 202 (West 1984 & Supp. 1995) (stating that statute's purpose is to provide protection and safety both to public and each minor in juvenile system).

91. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

92. See *Santana v. Collazo*, 714 F.2d 1172, 1176-77 (1st Cir. 1983) (holding that removal of juvenile from dangerous or unhealthy environment is legitimate exercise of state's *parens patriae* authority), cert. denied, 466 U.S. 974 (1984). But see *Alexander v. Boyd*, 876 F. Supp. 773, 796 (D.S.C. 1995) (holding that purpose of confining juveniles was to provide training to correct delinquent behavior).

93. 714 F.2d 1172 (1st Cir. 1983), cert. denied, 466 U.S. 974 (1984).

94. *Id.* at 1182. The restraint in this case was long-term isolation. *Id.* at 1182 n.7. See also *Alexander*, 876 F. Supp. at 798 (holding that freedom from unreasonable restraint includes freedom from unnecessary bodily restraint as well as "unreasonably restrictive conditions of confinement").

cern for a safe environment as the basis for removing fire hazards.⁹⁵ Some courts have used the rationale of *Youngberg* to rule that children are entitled to minimum care⁹⁶ and other courts have ruled that the Eighth Amendment concern for humane care is subsumed into the Fourteenth Amendment by virtue of *Youngberg*'s right to safe care and freedom from restraint.⁹⁷

The most interesting recent ruling appears in *Alexander S. v. Boyd*.⁹⁸ There, the court specifically looked to the purpose of the juvenile court and found that *Romeo* required that children receive training that provides them with a

reasonable opportunity to accomplish the purpose of their confinement, to protect the safety of the juveniles and the staff, and to ensure the safety of the community once the juveniles are ultimately released. Minimally adequate program services should be designed to teach juveniles the basic principles that are essential to correcting their conduct. These generally recognized principles include: (1) taking responsibility for the consequence of their actions; (2) learning appropriate ways of responding to others (coping skills); (3) learning to manage their anger; and (4) developing a positive sense of accomplishment.⁹⁹

This ruling is interesting for two reasons. First, unlike the court in *Youngberg*, the *Alexander S.* court envisioned training or treatment in relation to the outside world, not in relation to life inside the institution.¹⁰⁰ Second, in no right to treatment case before *Alexander S.* did a judge specifically state the purpose of treatment. While all the cases speak about the need for rehabilitation and many set forth the instrumentalities by which it is to occur, none suggests the normative goals of treatment and none defines rehabilitation. To some extent, the absence of definition and goals reflects the flaw in using the medical model in juvenile court. Although the symptoms of criminality are obvious, the causes are not. There is virtually no unanimity in the

95. *Santana*, 714 F.2d at 1183. See also *Alexander*, 876 F. Supp. at 786 (holding that use of individual padlocks on cells created unreasonable infringement on juveniles' safety in case of fire).

96. See, e.g., *In re V.H.*, 554 N.E.2d 686, 690 (Ill. App. Ct.) (holding that constitution recognizes liberty interest requiring minimally adequate care and treatment of confined juveniles), cert. denied, 561 N.E.2d 709 (Ill. 1990).

97. See *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987) (holding that Fourteenth Amendment applied to confinement when no conviction involved and that Due Process Clause, which implicitly incorporates the Cruel and Unusual Punishment Clause, is constitutionally minimal standard); *Alexander*, 876 F. Supp. at 796 (finding that absent conviction, Fourteenth Amendment Due Process Clause, encompassing protections of Eighth Amendment, is appropriate standard for juveniles); *Santana*, 714 F.2d at 1179 (holding that Eighth Amendment standard prohibiting cruel and unusual conditions inadequate to cover juvenile detainees which required closer scrutiny of confinement conditions than that accorded convicted criminals).

98. 876 F. Supp. 773 (D.S.C. 1995).

99. *Id.* at 790.

100. See *id.* (holding that appropriate programming can substantially enhance juveniles' opportunity to succeed on release from confinement). See *supra* note 81 and accompanying text for a discussion of why the *Romeo* Court did not have to rule on a right to training.

social sciences regarding the cause of crime.¹⁰¹ Many conditions, external and internal to the individual, show correlations to anti-social behavior but causation cannot be proven. Because the causes are elusive, the treatment is imprecise at best. While some programs have been shown to reduce crime,¹⁰² none can claim great success or universal utility. Even those that show success in the aggregate cannot necessarily predict success in a specific case. The Progressives favored a treatment modality that would provide skills and inculcate responsibility through work and strict discipline and assumed that it would cure crime.¹⁰³ However, little is certain about its success rate.¹⁰⁴ Modern theorists sought psychosocial treatment modalities rather than work and strict discipline, and assumed that this would cure crime. All reflected the thinking of their times.¹⁰⁵ Nonetheless, the "disease" has not been cured.

In any case, *Alexander S.* stands alone in suggesting the purpose of treatment. *Alexander S.* reflects both rehabilitative concerns as well as societal protection concerns. It stresses competencies to be achieved and services to be provided. It also has the realizable goal of affecting behaviors which correlate to criminal activity.

As was noted earlier, several courts have recently tried to incorporate Eighth Amendment concerns, a constitutional source of the right to treatment in early cases, into the protections of the Fourteenth Amendment.¹⁰⁶ Courts that have done so believe that the scrutiny given to conditions relating to personal safety and physical restraints in treatment facilities is more exact-

101. See generally CLIFFORD E. SIMONSEN, *JUVENILE JUSTICE IN AMERICA* (3d ed. 1991) (discussing validity of various proposed causes of criminality).

102. See Milton S. Eisenhower Found., Report, *Youth Involvement and Community Reconstruction: Street Lessons on Drugs and Crime*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 503, 558-62 (1991) (discussing several youth programs that challenge myth that "nothing works" with disadvantaged youth).

103. See PLATT, *supra* note 7, at 67-74 (discussing remedial value of skill development and training); ROTHMAN *supra* note 3, at 264-65 (discussing rehabilitation methods successful with juveniles).

104. See ROTHMAN, *supra* note 3, at ch. 8 (discussing outcomes of various skills training approaches).

105. By 1910, psychologists and psychiatrists had endorsed the juvenile court, and guidance clinics appeared around 1930. *Id.* at 215. However, in reality, mental health treatment seldom existed. By 1980, courts and standard setting groups had accepted such services as essential to the prevention of crime and to rehabilitation. See U.S. DEP'T OF JUSTICE, NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, REPORT, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE, 12-15 (1980) (arguing that comprehensive health plan must include preventive and diagnostic services which can significantly affect juvenile's health and emotional well-being).

106. See, e.g., Gary H. v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987) (holding that Fourteenth Amendment protected juvenile detainees); Santana v. Collazo, 714 F.2d 1172, 1179 (1st Cir. 1983) (holding that Eighth Amendment standard prohibiting cruel and unusual punishment inadequate to protect juvenile offenders), *cert. denied*, 466 U.S. 974 (1985); Alexander v. Boyd, 876 F. Supp. 773, 796 (D.S.C. 1995) (holding that Fourteenth Amendment Due Process Clause encompassing Eighth Amendment protections was appropriate standard for juveniles).

ing than that given to conditions in penal institutions.¹⁰⁷ Given recent cases concerning the application of the Eighth Amendment to prison conditions, such incorporation is wise. In a line of cases beginning with *Rhodes v. Chapman*,¹⁰⁸ the United States Supreme Court has curtailed the use of the Eighth Amendment to challenge conditions of confinement.¹⁰⁹ In *Rhodes*, the Court reiterated that non-barbarous punishments that "involve the unnecessary and wanton infliction of pain"¹¹⁰ violate the Eighth Amendment, and that the "evolving standards of decency that mark the progress of a maturing society"¹¹¹ remain the standard for evaluating cruel and unusual punishments. Nonetheless, the Court in *Rhodes* showed a reluctance to brand overcrowded prison conditions unconstitutional. Further, the Court noted that "[t]o the extent that such conditions are restrictive or even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."¹¹²

In *Wilson v. Seiter*,¹¹³ the United States Supreme Court looked at the actions of the prison administrators rather than at the conditions of the prison themselves when addressing claims based on the Eighth Amendment.¹¹⁴ In *Wilson*, the Court held that intent is critical to an Eighth Amendment claim¹¹⁵ and that a plaintiff must show that a prison official acted with deliberate indifference towards the claimant before a prison condition can amount to cruel and unusual punishment.¹¹⁶ Two years later, in *Farmer v. Brennan*,¹¹⁷ the Supreme Court emphasized that the Eighth Amendment was about punishment and not prison conditions.¹¹⁸ While recognizing that the Eighth Amendment required that prisoners receive ade-

107. The *Santana* court did note, however, that the distinction between conditions imposed for order and safety and those imposed for punishment may be a fine one. *Santana*, 714 F.2d at 1179.

108. 452 U.S. 337, 347-48 (1981).

109. Congress has also recently curtailed the use of the Eighth Amendment to challenge conditions of confinement. In 1994, Congress passed the Violent Crime Control Act. A provision of this act states that jail or prison crowding can be found unconstitutional only if it inflicts cruel and unusual punishment on a particular inmate and relief for such a violation must be limited to the removal of the condition. 18 U.S.C. § 3626(a)(1) (1994). The 104th Congress is also currently considering bills that would limit prisoners' relief in prison conditions cases to the removal of that condition, require prisoners to show that crowding is the primary cause of the deprivation of individual rights, terminate all consent decrees regarding prison conditions within two years after they were made or after the act is passed, and limit attorneys' fees so that no monitoring fees could be awarded. S. 400, 104th Cong., 1st Sess. (1995); H.R. 667, 104th Cong., 1st Sess. tit. III (1995).

110. *Rhodes*, 452 U.S. at 345 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

111: *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

112. *Id.* at 347.

113. 501 U.S. 294 (1991).

114. *Id.* at 296.

115. *Id.* at 301.

116. *Id.* at 303.

117. 114 S. Ct. 1970 (1994).

118. *Id.* at 1974.

quate food, shelter, clothing and medical services,¹¹⁹ the Court stated that a prison official's failure to provide such humane treatment becomes a cruel and unusual punishment only if the deprivation is, objectively, sufficiently serious¹²⁰ and if the prison official knows of and disregards the excessive risk to the inmate's health or safety.¹²¹

In light of *Youngberg* and recent Eighth Amendment jurisprudence, the constitutional right to treatment for confined juveniles has lost much of its doctrinal foundation. As currently understood, the Fourteenth and Eighth Amendments require only freedom from unnecessary restraint and minimally humane conditions of confinement. Food, clothing, shelter and medical care must only be adequate enough to avoid harm.¹²² In the main, treatment or training is directed at little more than preserving the peace within the training school.

Moreover, to the extent that a violation of even these minimal standards occurs, federal judges are precluded from issuing sweeping corrective injunctions by the "hands off" doctrine.¹²³ As early as 1974, the United States Supreme Court began to show great deference to prison administrators and to tell trial court judges to refrain from interfering with the day-to-day operations of prisons.¹²⁴ Both principles were spelled out forcefully in *Bell v. Wolfish*.¹²⁵ In *Bell*, the Supreme Court recognized that pre-trial detainees have constitutional rights, but stated that by virtue of their situation, they do not possess the full range of freedoms possessed by an unincarcerated person and that a mutual accommodation must exist between the constitutionally protected rights of the inmate and the legitimate needs of the institution.¹²⁶ Further, if an institutional restriction impinged on a specific constitutional guarantee, the Court said that the practice must be evaluated in light of the

119. *Id.* at 1976.

120. *Id.* at 1977.

121. *Id.* at 1979.

122. Since *Farmer*, federal courts of appeals have addressed Eighth Amendment challenges to prison conditions. See *Williams v. Delo*, 49 F.3d 442, 445 (8th Cir. 1995) (holding that placement of prisoner in cell for four days without bedding and clothing did not violate Eighth Amendment); *Taylor v. Freeman*, 34 F.3d 266, 271 (4th Cir. 1994) (holding that overcrowding must present inmates with substantial risk of harm in order to constitute Eighth Amendment violation); *Raine v. Williford*, 32 F.3d 1024, 1035 (7th Cir. 1994) (holding that low temperatures in prisoner's cell created a substantial enough risk of harm to meet threshold requirement of claiming Eighth Amendment violation).

123. See *Procunier v. Martinez*, 416 U.S. 396, 404 (1974) (noting that federal courts traditionally take broad hands-off attitude towards problems of prison administration), *overruled on other grounds* by *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

124. See, e.g., *id.* at 404-05 (noting that courts are ill-equipped to deal with increasingly difficult problems of prison administration and reform); *Procunier v. Pell*, 417 U.S. 817, 827 (1974) (stating that although courts cannot abdicate constitutional responsibilities, courts should defer to expert judgment of corrections officials).

125. 441 U.S. 520 (1979). This case concerned conditions of confinement for pre-trial detainees.

126. *Id.* at 546.

prison administrator's need to safeguard the institution.¹²⁷ Finally, the Court indicated that because the problems arising in the operation of a prison do not lend themselves to easy solutions, and because such considerations fall within the expertise of prison officials, courts should normally defer to their professional judgment.¹²⁸ In its concluding paragraphs, the Court chastised trial judges who had become "enmeshed in the minutiae of prison operations,"¹²⁹ and limited a court's inquiry into prison management to the question of whether the regimen violates the Constitution.¹³⁰

This deference towards institutional administrators has not been limited to prison officials. In the same year as *Bell*, the Supreme Court took the same approach to officials working in mental health facilities.¹³¹ Later, in *Youngberg*, the Supreme Court extended both prongs of the "hands off" doctrine to conditions in mental health facilities by balancing the patient's freedom from restraint against institutional needs and conferring a presumption of correctness upon judgments made by medical professionals.¹³² Thus, judicial rulings concerning both types of right to treatment cases, those involving humane conditions in corrections facilities and those involving the quasi-medical model, are now limited by the "hands off" doctrine.

III. WHAT IS LEFT OF THE CONSTITUTIONAL RIGHT TO TREATMENT DOCTRINE

The majority of opinions in right to treatment cases concerning juvenile treatment centers were written before 1979. *Bell*, *Rhodes*, and *Youngberg* were all decided between 1979 and 1983. If those cases had existed at the time the constitutional right to treatment doctrine was developing, the doctrine would have looked much different. Although children would have been granted a right to safe conditions, encompassing food, shelter, clothing, and medical care, the standard used to evaluate those conditions would have been "mere adequacy." For example, overcrowding would have risen to a constitutional violation only if it resulted in objectively seriously unsafe conditions. Minimal medical treatment and architecturally suspect facilities would only violate the Constitution if they created serious health hazards. If conditions were merely harsh or restrictive, that would have been the price children would have had to pay for their transgressions.

Children would have had a right to freedom from physical restraints but only so long as institutional safety was not compromised. Disciplinary sanctions such as isolation might not have been forbidden¹³³ and corporal punish-

127. *Id.* at 547.

128. *Id.* at 548.

129. *Id.* at 562.

130. *Id.*

131. See *Parham v. J.R.*, 442 U.S. 584, 620 (1979) (limiting judicial review of medical decisions made by professionals).

132. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

133. See *Sandin v. Conner*, 115 S. Ct. 2293, 2301 (1995) (holding that placing adult prisoners in solitary confinement for disciplinary reasons did not automatically trigger protection under

ment might have been permitted.¹³⁴ Further, when such practices were evaluated by the courts, the judgments of institutional officials would have received greater deference. To the extent that their judgments differed with those of experts or standard-setting groups, they would have been condoned by the court unless they were completely outside the realm of standard practices.

Treatment itself might have been viewed differently. If *Youngberg* was interpreted to require training in relation to rights possessed inside the institution, the treatment in juvenile training schools would have been limited to preserving safety and freedom from restraint instead of improving or rehabilitating the child for life in society.¹³⁵ This would be especially true if a court, either by virtue of its reading of *In re Gault* or of the purpose clause of the state statute, believed that community protection was a valid purpose of the juvenile court. Equally important, the sweeping remedial orders issued in *Morales* and in other cases most likely would not have been issued. The courts would have had to limit their inquiry to discerning constitutional violations and could not enmesh themselves in the minutiae of prison administration. Thus, their orders would not have set treatment and training standards, personnel ratios, space and occupancy limitations, and other requirements that are the province of the administrative branch of the government. Indeed, if the cases were brought today, the courts might have had to find that training school officials had an intent to harm the children or that they at

Due Process Clause); *Santana v. Collazo*, 714 F.2d 1172, 1181 (1st Cir. 1983) (same), *cert. denied*, 466 U.S. 974 (1984).

134. Only one federal court of appeals has ruled that corporal punishment in prison violates the Eighth Amendment. See *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (holding that use of strap is punishment which violates Eighth Amendment). On the other hand, the Supreme Court has upheld moderate corporal punishment in schools, saying that neither the Eighth nor the Fourteenth Amendment prohibit it. See *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (holding that paddling of children as means of discipline is not constitutional violation). Indeed, children were subjected to corporal punishment in the British juvenile justice system until quite recently. See Wallace Mlyniec, *Corporal Punishment in the United Kingdom and the United States: Violation of Human Rights or Legitimate State Action*, 8 B.C. INTERNAT'L & COMP. L. REV. 39, 58-62 (1985) (discussing cases regarding corporal punishment in schools and noting that British Government announced intention to propose legislation curtailing use of corporal punishment in education system). Further, corporal punishment was specifically listed as a sanction for children in early state statutes and children were repeatedly subject to corporal punishment in reformatories and training schools before and after the advent of the juvenile court. See PLATT, *supra* note 7, at 101-02 (discussing provisions for protection and custody of delinquent children throughout nineteenth century); ROTHMAN, *supra* note 3, at 279-82 (noting the harsh punishment to which children were subjected and discussing reasons why dismal conditions existed). On the other hand, the "hog tying" and gratuitous beating of children which came to light in the litigation would probably be unconstitutional under any standard.

135. Some courts, like that in *Alexander S.*, have not limited *Youngberg* in this way. See *Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995) (holding that Constitution requires minimally adequate level of training to provide juveniles with reasonable opportunity to accomplish purpose of confinement). Further, doing so would place the constitutional minimum well below the requirements of state law. See *infra* section V for a discussion of the right to rehabilitation and care under state law.

least showed a deliberate indifference to the children's welfare before the court could even find a constitutional violation.

Recent right to treatment cases demonstrate the new reticence of federal courts to rule on these issues. In *Santana v. Collazo*,¹³⁶ the United States Court of Appeals for the First Circuit agreed with the district court judge that the Fourteenth Amendment conferred no right to treatment.¹³⁷ The First Circuit remanded the case only for an inquiry regarding safety and freedom from physical restraints posed by fire hazards and by isolation as a disciplinary sanction.¹³⁸ Further, it upheld a portion of the district court's ruling that found no constitutional violations even though the conditions in the facilities were "far from ideal."¹³⁹

In *Gary H. v. Hegstrom*,¹⁴⁰ the United States Court of Appeals for the Ninth Circuit accepted the legal reasoning of the *Santana* court. The *Gary H.* court then required that only minimally adequate training be provided and that minimal sanitary, health, educational, and medical resources be made available.¹⁴¹ Further, the provision of services had to be balanced against the interests and needs of the institution.¹⁴² Moreover, the Ninth Circuit rejected the lower court's imposition of model institution standards that had been proposed by a professional association, saying that it "is not the duty of the district judge to fashion operating manuals for state institutions."¹⁴³

In *Hill v. DeKalb Regional Youth Detention Center*,¹⁴⁴ the United States Court of Appeals for the Eleventh Circuit ruled that the county and the supervisors of a detention center employee who sexually assaulted an inmate were not liable for damages because the child could not show a "deliberate indifference" to his medical needs on their part.¹⁴⁵ In *In re C.S.*,¹⁴⁶ the Iowa Supreme Court reversed a lower court order placing a child in a boys ranch, even though the supreme court agreed that it was a better placement than that proposed by the state.¹⁴⁷ It did so because the United States Constitution only requires minimally adequate treatment.¹⁴⁸

136. 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

137. *Id.* at 1177.

138. *Id.* at 1183.

139. *Id.* at 1176. In *Santana*, prison officials inflicted physical abuse on the juveniles as a form of punishment. Juveniles were also placed in isolation for several months at a time for reasons such as having an infectious disease, being epileptic, or being disrespectful to prison officials. There the juveniles' sole activities were eating and sleeping; they were not allowed to attend academic or vocational classes and the only reading material made available to them was the Bible. *Id.* at 1178.

140. 831 F.2d 1430 (9th Cir. 1987).

141. *Id.* at 1432.

142. *Id.* at 1432-33.

143. *Id.* at 1433.

144. 40 F.3d 1176 (11th Cir. 1994).

145. *Id.* at 1192.

146. 516 N.W.2d 851 (Iowa 1994).

147. *Id.* at 857.

148. *Id.* at 860 (citing *Youngberg v. Romeo*, 457 U.S. 307, 308 (1982)).

The court in *Alexander S. v. Boyd*¹⁴⁹ also adopted the legal reasoning of *Santana*. The *Alexander S.* court ruled that children were entitled to treatment that would enable them to correct their behavior.¹⁵⁰ Furthermore, the court held that children were entitled to basic services such as an adequately trained staff, minimal levels of programming, and other such services that would enable the children to achieve their goals.¹⁵¹ Although the judge found that this minimal right to treatment had been violated, his order was modest.¹⁵² Rather than releasing the children or ordering their placements in other facilities to relieve overcrowding, he ordered the agency to develop a plan for new facilities; rather than implementing a new disciplinary process, he merely banned the use of CS gas (tear gas) to control the facility because it posed an undue risk of bodily harm.¹⁵³ Although cockroach-infested food and locking devices that posed fire hazards were found to violate the right to be safe, the court refused to issue remedial orders.¹⁵⁴ Instead, the court gave the institution six months to fashion a plan to correct the conditions.¹⁵⁵

Decisions in recent cases demonstrate the limits of the constitutional right to treatment doctrine. The Supreme Court's jurisprudence concerning treatment, prison conditions, and deference to professionals has made trial courts reluctant to find constitutional violations or to make sweeping remedial orders when such violations are found. If advocates for children seek to improve the conditions of state training schools and establish sound rehabilitative programs, new legal remedies must be sought.

IV. EFFECTIVE REHABILITATIVE CARE AND APPROPRIATE PUNISHMENT (IN THEORY AND IN STATE LAW)

As the constitutional right to treatment withered, rehabilitation lost its place as the sole purpose of juvenile justice systems in several states.¹⁵⁶ Legislatures have explicitly endorsed punishment,¹⁵⁷ accountability,¹⁵⁸ and other

149. 876 F. Supp. 773 (D.S.C. 1995).

150. *Id.* at 788.

151. *Id.* at 788, 790.

152. *See id.* at 803-04 (stating that principles of federalism required court to allow state to devise plan to remedy constitutional violations).

153. *Id.* at 804.

154. *Id.*

155. *Id.*

156. *See* Feld, *supra* note 20.

157. *See* ARK. CODE ANN. § 9-27-302(3) (Michie 1987) (authorizing sanctions based on seriousness of offense); CAL. WELF. & INST. CODE § 202(e) (West 1984) (defining punishment as either payment of fine, limitations on minor's liberty, or commitment to local detention or treatment facility); FLA. STAT. ANN. § 39.001(c) (West 1941 & Supp. 1995) (stating that purpose of statute is partially to ensure protection of society and to provide appropriate control, discipline and punishment); HAW. REV. STAT. § 571-1 (1988) (stating that statute creates policy and purpose of courts to "render appropriate punishment to offenders"); WASH. REV. CODE ANN. § 13.40.010 (West 1995) (stating that punishment, accountability and treatment are "equally important" purposes); *see also In re J.L.A.*, 643 A.2d 538, 543 (N.J. 1994) (discussing New Jersey's Juvenile Code and noting that statute recognizes needs of public safety and provides harsher penalties).

principles besides rehabilitation¹⁵⁹ within the juvenile justice system. Some disposition statutes, which formerly focused almost exclusively on the needs of the offender, now include mandatory minimum terms of commitment based solely on the instant offense or the child's record of offenses.¹⁶⁰

Although these developments represent a dramatic change in the design of the juvenile justice systems of some states, they do not warrant the conclusion that the provision of rehabilitative care is no longer an essential aspect of modern juvenile justice. Most state juvenile codes contain express promises of rehabilitative care.¹⁶¹ Several state courts have recently reaffirmed the rehabilitative approach to juvenile justice.¹⁶² Additionally, every juvenile court in the country exercises jurisdiction as *parens patriae*. For a century, this doctrine has committed the state to providing delinquent children with substituted parental care. As it has from the beginning, this means care that will enable children to develop into adults who are capable of meeting their own needs, providing for their families, and contributing positively to their communities.

Indeed, even states endorsing punishment remain committed to rehabilitation. California, for example, has authorized only "punishment that is con-

158. See ALA. CODE § 12-15-71 (1975 & Supp. 1994) (placing accountability for children in hands of parents or children); IDAHO CODE § 16-1801 (1979 & Supp. 1994) (stating that accountability for juvenile offenders is with case managers, families and community); MISS. CODE ANN. § 43-21-103 (1972) (providing that parents of juvenile offenders are primarily responsible for care, support, education and welfare of children); N.M. STAT. ANN. § 32A-2-2(A) (Michie 1978) (holding juvenile offenders accountable for their actions); TEX. FAM. CODE ANN. § 51.01(c) (West 1995) (stating that purpose of statute is to provide treatment, training and rehabilitation that emphasizes accountability and responsibility of parent and child for child's conduct).

159. See NEB. REV. STAT. § 43-246(3) (1994) (providing that intent of statute is to reduce possibility of juvenile offenders committing future crimes); OKLA. STAT. ANN. tit. 10, § 7001-1.2 (West 1995) (calling for maintaining integrity of substantive law prohibiting certain behavior); TEX. FAM. CODE ANN. § 51.01(2) (West 1995) (stating that statute should be construed to effectuate purpose of controlling commission of unlawful acts by children). In addition, numerous statutes recognize the need to protect the public safety. See, e.g., N.D. CENT. CODE § 27-20-01 (1993) (stating that public safety if of utmost concern).

160. See, e.g., ALA. CODE § 12-15-71.1 (1975 & Supp. 1994) (setting forth sentencing guidelines based on degree of offense); see also Feld, *supra* note 20, at 851-79 (analyzing determinate and mandatory minimum dispositional statutes).

161. The exact formulation of what is promised varies among some combination of care, custody, control, guidance, discipline, supervision, treatment, training, and rehabilitation. See ALA. CODE § 12-15-1.1(7) (1975 & 1994 Supp.) (stating that one of statute's goals is "to provide a program of supervision, care, and rehabilitation" for delinquent children); OKLA. STAT. ANN. tit. 10, § 7001-1.2 (West 1995) (stating that goal is to "provide a system for the rehabilitation and the reintegration of juvenile delinquents into society" and "secure for any juvenile removed from the custody of his parents the necessary treatment, care, guidance, and discipline to assist him in becoming a responsible and productive member of society"); R.I. GEN. LAWS § 14-1-2(1) (1994) (stating that purpose of statute is "[t]o secure for each child . . . such care, guidance, and control . . . as will serve the child's welfare and the best interest of the state").

162. See *Ex parte S.F.R.*, 598 So. 2d 1006, 1008 (Ala. 1992) (refusing to give credit to juvenile offender for previous time in detention based on need to fully rehabilitate youth); *In re J.F.*, 787 P.2d 364, 365 (Mont. 1990) (holding that juvenile offender needed less restrictive, more rehabilitative setting, to address alcoholism).

sistent with the rehabilitative objectives" of its code and has expressly excluded retribution from the definition of "punishment" within the juvenile code.¹⁶³ Washington's Supreme Court has stated that under the Juvenile Justice Act "the purposes of rendering a child accountable for his acts, punishing him and exacting retribution from him are tempered by, and in some cases must give way to, purposes of responding to the needs of the child."¹⁶⁴ By making rehabilitation the measure of appropriate punishment, these states have manifestly reaffirmed a commitment to providing rehabilitative care to delinquent children even while they seek to achieve other goals as well.

In the District of Columbia, where the juvenile justice code does not mention punishment, the highest court, in *In re L.J.*, recognized its proper place, even in a jurisdiction "firmly committed to a rehabilitative approach."¹⁶⁵ Describing the role of a modern juvenile court confronting a frightening level of violence, the court explained that "rehabilitation is not necessarily synonymous with leniency."¹⁶⁶

[A] disposition judge may reasonably conclude that the judicial system can significantly contribute to the rehabilitation of a delinquent by teaching him that conduct does have consequences and that, so far as the judge can make them so, the results of antisocial behavior are predictable. Many, perhaps most, youngsters can respond to a rational message. If you do well, good things happen to you. If you commit a little crime, you pay a little price. If you commit a greater crime, the pain is a little greater. A first offense can be treated leniently, but if you do it again, you are subject to an escalating series of wincings—and you had better believe it because the judge does not promise severe consequences and then just slap your wrist. That is an approach that a youngster can at least potentially understand.¹⁶⁷

Relying on settled notions of *parens patriae* authority rather than a recent legislative endorsement of punishment, this opinion demonstrates that appropriate punishment, like appropriate care, is inherent in the traditional conception of the juvenile court. The United States Supreme Court had long since acknowledged this. In *McKeiver v. Pennsylvania*,¹⁶⁸ the Court referred repeatedly to a task force report which stated in part, "[w]hat should distin-

163. CAL. WELF. & INST. CODE § 202(e). Similarly, Florida does not authorize punishment for its own sake, but only "punishment that discourages further delinquent behavior." FLA. REV. STAT. ANN. § 39.002(4)(b); cf. *In re J.L.A.*, 643 A.2d 538, 543 (N.J. 1994) (holding that punishment was appropriate in light of legislative view of "retributive sentencing goals as legitimate"). Nevertheless, the *J.L.A.* court went on to assert that rehabilitation "remains a primary goal of the Juvenile Code," *id.* at 542, and that a rehabilitated youth should not be confined solely for purpose of retribution. *Id.* at 545.

164. *State v. Rice*, 655 P.2d 1145, 1150 (Wash. 1982). Earlier in its opinion, the court observed that the "legislative directive that the juvenile justice system respond to the needs of the offender is therefore one of considerable significance." *Id.*

165. *In re L.J.*, 546 A.2d 429, 436 (D.C. 1988).

166. *Id.* at 438.

167. *Id.* at 439.

168. 403 U.S. 528 (1976).

guish the juvenile from the criminal courts is greater emphasis on rehabilitation, not exclusive preoccupation with it."¹⁶⁹

The infliction of punishment has coexisted with the promise of rehabilitation for as long as delinquent children have been securely confined. The belief that confinement ever could be wholly rehabilitative and not at all punitive ignores the experience of the confined children. To them, confinement is punishment, no matter what a judge, counselor, or correctional officer calls it, and no matter how helpful or rehabilitative it actually is. Acknowledging the existence and even inevitability of punishment in juvenile justice does not render rehabilitation unattainable or dispensable. The challenge today, as ever, is to insure that meaningful rehabilitation accompanies the inevitable punishment. The problem is a practical one, not a doctrinal one. States need only take advantage of existing knowledge about what programs are effective and provide sufficient funds and facilities for their operation.¹⁷⁰

Even staunch supporters of rehabilitative programs recognize the usefulness of appropriate sanctions in assisting a delinquent child's development. Barry Krisberg has written and spoken often of the potential benefits from programs based on the principle of "graduated sanctions," which he describes as follows:

A model system of graduated sanctions should combine reasonable, fair, humane and appropriate penalties with rehabilitative services. There must be a continuum of care consisting of a variety of diverse programs. Youths should move between different levels on the continuum based on their behavior. Offenders must understand that they will be subject to more severe sanctions should they continue to reoffend.¹⁷¹

There is an unmistakable similarity between this description and the earlier statement quoted from *In re L.J.*¹⁷² This balance between discipline and support, and the limited place of punishment in the California and Florida codes are consistent with accepted notions of child-rearing. As parents may lawfully impose discipline, so may the state as it seeks to guide delinquent children in their development into responsible adults. The higher profile given to punishment and accountability in recent legislation should not divert attention away from the still-present promise to provide rehabilitative care. All children must learn discipline and responsibility.

169. *Id.* at 546 n.6 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND CRIME 9 (1967)).

170. For a contrary view of punishment and treatment as "mutually exclusive penal goals," see Feld, *supra* note 20, at 833.

171. *Hearings before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994) (testimony of Barry Krisberg); see also JOHN WILSON & JAMES C. HOWELL, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS, 11 (1994) (discussing that "[r]esearch and experience in intervention and treatment programming suggest that a highly structured system of graduated sanctions holds significant promise").

172. See *supra* notes 166-67 and accompanying text for the language of *In re L.J.*

Krisberg demonstrates the necessary interplay between sanctions and services.¹⁷³ The Office of Juvenile Justice and Delinquency Prevention reached this same conclusion with respect to the most serious juvenile offenders and the most extreme sanction: confinement. A 1994 report concluded that "secure sanctions are most effective in changing future conduct when they are coupled with comprehensive treatment and rehabilitation services."¹⁷⁴ Our own observations representing delinquent children for a combined total of thirty years add further support for these conclusions.¹⁷⁵

Because children pass beyond the jurisdiction of the juvenile justice system at a certain age,¹⁷⁶ a state's failure to care properly for the children in its custody not only harms the children themselves, it undermines the community's interest in safety and order.¹⁷⁷ If children leave the state's care without having learned how to behave lawfully, deal with conflict, control emotions, or relate to others, and without the ability to earn a living or to further their education, they are at grave risk of committing additional offenses, thereby causing injury to some other person and further reducing their own prospects for development.¹⁷⁸ The potential harm increases if children leave the state's care with an oppositional attitude toward authority due to the juvenile justice system's lack of concern for their well-being.

Statutes and cases from several states recognize this vital interrelationship between the provision of effective rehabilitative services, the imposition of sanctions, and the protection of the public interest.¹⁷⁹ Maryland offers a

173. See *supra* note 171 and accompanying text for Krisberg's view on the interplay between sanctions and services.

174. WILSON & HOWELL, *supra* note 171, at 21; see also David W. Roush, *Juvenile Detention Programming*, 57 FED. PROBATION 20, 24 (1993) ("In most instances, the relationship between helpful programs and punishment is inversely proportional. That is, as helpful program development expands, the emphasis on and need for punishment decreases.").

175. Nine months on a project assisting children confined in three dysfunctional institutions amply demonstrated how children struggle with the disciplinary restraints imposed upon them in the absence of constructive programming. Staff, also frustrated by programming deficiencies, were unable to engage the residents in a dialogue about how to change their behavior in the institution or how they would behave after they left. The routine at these facilities degenerated into a pathetic, yet frightening, game wherein both staff and residents brought out the worst in each other and the children wound up locked in their rooms for far too much time.

176. The age at which juvenile jurisdiction terminates is typically twenty-one. See, e.g., D.C. CODE ANN. § 16-2303 (1994) (stating that jurisdiction retained until child reaches age of 21). However, the age may be as low as eighteen. See ARIZ. REV. STAT. ANN. § 8-202(E) (1956 & Supp. 1994) (stating that juvenile court retains jurisdiction until child reaches age of 18).

177. See *Alexander S. v. Boyd*, 876 F. Supp. 773, 780 (D.S.C. 1995) (suggesting correlation between state's violent crime rate for adults—fifth highest in the nation—and its expenditures on its juvenile corrections system—seventh lowest in the nation).

178. See Sheryl Brissett-Chapman, *Reactions And Solutions*, in *Symposium, The Unnecessary Detention of Children in the District of Columbia*, 3 D.C. L. REV. 425, 425-26 (1995) ("Rehabilitation will not occur and the recidivism rate will not be reduced if the adolescent does not acquire mastery and competency.").

179. See, e.g., ARK. CODE ANN. § 9-27-302 (1994) (stating that one purpose of Juvenile Code is "[t]o protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution"); NEB. REV.

striking example of the way in which legislators struggle to find language to synthesize these goals. The statute governing dispositions in delinquency cases states that "[t]he priorities in making a disposition are the public safety and a program of treatment, training, and rehabilitation best suited to the physical, mental and moral welfare of the child consistent with the public interest."¹⁸⁰ The clause begins with "public safety," moves to a comprehensive look at the child's needs, and then turns back to "the public interest." The importance of meaningful rehabilitative care is not lost amid the legislature's obvious and twice-stated concern for public safety. The Court of Appeals of Maryland has "repeatedly said that the foremost consideration in a juvenile proceeding after a determination of delinquency is to provide children with a program of treatment and rehabilitation."¹⁸¹ Just as care can co-exist with punishment in a properly functioning juvenile justice system, so must a concern for public safety be tied to a responsibility to rehabilitate delinquent children. In fact, public safety cannot likely be maintained unless children receive the care which they need and which the law promises them.

V. THE RIGHT TO REHABILITATIVE CARE AND SERVICES UNDER STATE LAW

The codes of several states contain specific provisions requiring that delinquent children receive the care and services they need. Illinois, for example, guarantees to every child subject to the jurisdiction of the juvenile court the "right to services necessary to his or her proper development, including health, education, and social services."¹⁸² Similarly, New Hampshire's pur-

STAT. § 43-246 (1994) (stating that purpose of code is to "reduce the possibility of [juveniles] committing future law violations through the provision of social and rehabilitative services to such juveniles and their families").

180. MD. CODE ANN., CTS & JUD. PROC. § 3-820 (1995).

181. *In re Keith G.*, 601 A.2d 1107, 1110 (Md. 1992) (citing *In re Patrick A.*, 540 A.2d 810, 812 (Md. 1988)); see also *In re Keith W.*, 527 A.2d 35, 38 (Md. 1987) (stating that "[a]s we see it, the overriding goal of Maryland's juvenile statutory scheme is to rehabilitate and treat delinquent juveniles so that they become useful and productive members of society"). For a contrary ordering of the two priorities, see *Thomas R. v. Juvenile Div.*, Eighth Judicial Dist. Court *ex rel.* County of Clark, 664 P.2d 947, 951 (Nev. 1983) (holding that "the primary purpose in delinquency cases is social control; and when one interest must predominate, it should be that of the public").

182. ILL. ANN. STAT. ch. 705, para. 405 (Smith-Hurd 1987). Illinois courts have rejected several appeals which have challenged commitment orders on the ground that they did not address the child's identified needs for care. See *In re T.T.*, Nos. 2-90-1202 to 2-90-1205, 1992 WL 193602 at *8 (Ill. App. Ct. Aug. 13, 1992) (upholding commitment of juvenile offender and trial court's determination that residential placement would not work); *In re G.S.*, 551 N.E.2d 337, 339 (Ill. App. Ct. 1990) (upholding commitment of juvenile delinquent to Department of Corrections where less secure alternatives were not in best interest of minor or public); *In re J.A.G.*, 446 N.E.2d 868, 870 (Ill. App. Ct. 1983) (holding that evidence insufficient to show violation of petitioner's right to treatment), *appeal denied*, 454 N.E.2d 330 (Ill. 1983). All three rulings were based, at least in part, on the fact that there was no evidence that the child would not receive the needed services while committed. See *T.T.*, 1992 WL 193602 at *7 (finding no evidence in record that juvenile would not receive psychotherapy); *J.A.G.*, 446 N.E.2d at 870 (finding insufficient evidence to indicate violation of constitutional right to treatment); *G.S.*, 551 N.E.2d at 339 (hold-

pose clause describes the court's mission of providing "the protection, care, treatment, counseling, supervision, and rehabilitative resources which [a child within the court's jurisdiction] needs and has a right to receive,"¹⁸³ while Kentucky's juvenile code states that "[a]ny child brought before the court under [the juvenile code] shall have a right to treatment reasonably calculated to bring about an improvement in his condition."¹⁸⁴ West Virginia law spells out the rights of confined juveniles in detail, including the rights to education, exercise, medical care, nutritious meals, and freedom from physical force and solitary confinement.¹⁸⁵ Florida's delinquency system is charged with providing substance abuse treatment to children and families "as resources permit."¹⁸⁶ A command such as this means that the agency must exhaust all resources in providing such services. The codes of Arizona and California provide that delinquent children "shall receive" "rehabilitation services"¹⁸⁷ and "care, treatment, and guidance"¹⁸⁸ respectively. The use of the term "right" and the command "shall receive" indicates that these statutes create rights which may be enforceable in both individual cases and class-action litigation whenever the states fail to provide appropriate services. Iowa and Texas both require that before a court can issue certain orders removing a delinquent child from his home, the court must certify that reasonable efforts have been made to prevent the need for removal.¹⁸⁹ One Iowa court has recognized that "[t]he reasonable efforts requirement provides a child's attorney a strong tool for enforcing client's [sic] rights to services and family integrity."¹⁹⁰ These examples demonstrate that state legislatures have not forsaken rehabilitation as a goal of the juvenile justice system even as some have introduced notions of punishment and accountability.¹⁹¹

Several state courts have ruled that delinquent children committed to the custody of the state have rights under state law to rehabilitative treat-

ing that no evidence presented indicated juvenile would not receive treatment in correctional institution). The notorious case of two very young Chicago boys convicted of murder has involved the judge in a painstaking effort to determine what the boys need and whether the state's facilities can provide it. See Gary Marx, *Is There Any Real Hope for Young Killers?*, CHI. TRIB., Jan. 26, 1996, at 1. It is regrettable that it takes such heinous behavior to prompt courts and the media to spend time finding out whether the juvenile justice system is currently set up to do what it promises.

183. N.H. REV. STAT. ANN. § 169-B:1 (1994).

184. KY. REV. STAT. ANN. § 600.10 (Michie/Bobbs-Merrill 1970).

185. W. VA. CODE § 49-5-16a. (1994); see *infra* notes 197-201 and accompanying text for a discussion of case law, based on the general purpose of the code, that provides a more general right to individualized treatment.

186. FLA. REV. STAT. ANN. § 39.002(2) (West 1994).

187. ARIZ. REV. STAT. ANN. 41-2816 (1995).

188. CAL. WELF. & INST. CODE § 202(b) (Deering 1995).

189. IOWA CODE ANN. § 232.52 (West 1995); TEX. FAM. CODE ANN. § 54.04(i)(2) (West 1995); *contra In re D.M.Y.*, 892 S.W.2d 792, 796 (Mo. Ct. App. 1995) (holding that reasonable efforts requirement applies to neglect cases but not delinquency cases).

190. *In re B.L.*, 491 N.W.2d 789, 793 (Iowa Ct. App. 1992); *accord In re M.D.S.*, 488 N.W.2d 715, 720 (Iowa Ct. App. 1992) (same).

191. See *supra* note 163 and accompanying text for a discussion of California's recognition of the legitimacy of punishment.

ment which will advance their development. Significantly, one of the most recent of these opinions was issued in Washington, the first state to list punishment as a goal of the juvenile justice system.¹⁹² In *State v. S.H.*,¹⁹³ the Washington Court of Appeals concluded that the purpose clause of the statute imposed a duty upon the state to provide treatment to every child whose custody was based on a need for treatment.¹⁹⁴ The court noted that the state did not even contest the existence of this duty.¹⁹⁵ Finally, the court described the right, stating that where the length of the disposition imposed was based on the child's need for treatment, the child "must receive adequate, individualized treatment provided by qualified persons, and the treatment must continue and be beneficial to the juvenile for the length of the disposition."¹⁹⁶

The Supreme Court of West Virginia has referred to the existence of a statutory right to individualized treatment on several occasions.¹⁹⁷ This right extends beyond the entitlements to services specifically listed in the code¹⁹⁸ and is based instead on the "rehabilitative goal" announced in the state's purpose clause.¹⁹⁹ Officials are "required to act in the best interest of the child and the public in establishing an individualized program of treatment which is directed toward the needs of the child and likely to result in the development of the child into a productive member of society."²⁰⁰ For as long as a child is subject to juvenile court jurisdiction, the court must act "to secure immediately the petitioner's placement in an appropriate juvenile rehabilitation and treatment facility whose program is designed to meet the petitioner's individual needs."²⁰¹

Without expressly articulating a right to rehabilitative care, the Montana Supreme Court has ruled that under that state's Youth Court Act, a trial

192. See *State v. S.H.*, 877 P.2d 205, 216 (Wash. Ct. App. 1994) (holding that juvenile offenders have right to rehabilitative treatment under state's Juvenile Justice Act).

193. 877 P.2d 205 (Wash. Ct. App. 1994).

194. *Id.* at 216.

195. *Id.* The state of South Carolina has likewise conceded that it has an "obligation to develop effective programming for all of the juveniles housed in the state's juvenile justice facilities." *Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995). The *Alexander S.* court did not state whether the concession was made under state or federal law, but had previously discussed both sources of the obligation. *Id.*

196. *S.H.*, 877 P.2d at 216. For a discussion of the limits that the court found to the scope of this right and judicial review of claims under it, see *infra* notes 264-65 and accompanying text.

197. See *State ex rel J.D.W. v. Harris*, 319 S.E.2d 815, 822 n.10 (W. Va. 1984) (stating that "[i]t is well-settled that a juvenile adjudged delinquent and committed to the custody of the state has a constitutional and a statutory right to rehabilitation and treatment"); *State v. Trent*, 289 S.E.2d 166, 175 (W. Va. 1982) (stating that "[w]e think there is little question that a child adjudged delinquent and committed to the custody of the State has both a constitutional and a statutory right to treatment").

198. See *supra* note 185 and accompanying text for the entitlements listed in the code.

199. *Trent*, 289 S.E.2d at 176-77; see also W. VA. CODE 49-1-1 (1994) (stating that "[t]he purpose of this chapter is to provide a comprehensive system of child welfare . . . with recognition of the State's responsibility . . . to provide a system for the rehabilitation and detention of juvenile delinquents").

200. *Trent*, 289 S.E.2d at 176.

201. *Id.* at 178.

court may not order that a delinquent child be placed at a facility which is incapable of meeting the child's recognized needs.²⁰² In addition, a judge on the District of Columbia Court of Appeals has written in a concurring opinion that the District has an obligation to "adhere to applicable rehabilitative standards" in caring for the delinquent children in its custody.²⁰³ The fact that the author of this opinion was also the author of the opinion in *In re L.J.*²⁰⁴ provides another example of the inescapable connection between the imposition of sanctions and the provision of rehabilitative services in an effective juvenile justice system.

Courts regularly invoke the "rehabilitative" nature of the juvenile justice system as a justification for differential treatment which children (or their attorneys) perceive as detrimental to their interests, such as the denial of the right to a jury trial,²⁰⁵ or the possibility of longer confinement than would be visited upon an adult convicted of the same offense.²⁰⁶ The Washington Supreme Court rejected a jury demand, notwithstanding the statutory recognition of punishment, based on the court's conclusion that the juvenile justice system remained rehabilitative.²⁰⁷ Although both the right to a jury trial and

202. *In re J.F.*, 787 P.2d 364, 366 (Mont. 1990). This ruling, like the one in *Trent*, was based primarily on the fact that the statute "sets forth the express legislative purpose . . . as being that of supervision, care and rehabilitation of the youth—not punishment." *Id.* at 366. This passage demonstrates that the purposes which legislatures list in their codes do matter. However, the Montana statute is not devoted exclusively to youths' needs without regard for the protection of the community. What the statute seeks to remove from delinquent youths are "the elements of retribution" which would befall an adult offender. See MONT. CODE ANN. 41-5-1-2(2) (1993) (stating that the statute "shall be interpreted and construed to effectuate the following express legislative purposes: . . . to remove from youth committing violations of the law the element of retribution and to substitute therefore a program of supervision, care, rehabilitation, and in appropriate cases, restitution as ordered by the youth court"). As such, it is typical of modern juvenile justice statutes, although clearly on the end of the spectrum which places a greater emphasis on rehabilitative care. For other statutes endorsing punishment but not retribution, see *supra* note 157.

203. *In re W.L.*, 603 A.2d 839, 849 (D.C. 1991) (Schwelb, J., concurring). Judge Schwelb's conclusion was based on a juvenile rule promising "care, custody, and discipline as nearly as possible equivalent to that which should have been provided for him by his parents," *id.*, the rehabilitative goals of the Juvenile Code, and local precedent recognizing the right of an individual to "a custody that is not inconsistent with the *parens patriae* premise of the law." *Id.* (quoting *Creek v. Stone*, 379 F.2d 106, 111 (D.C. Cir. 1967)).

204. 546 A.2d 429, 439 (D.C. 1988).

205. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 542 (1971) (holding that juvenile delinquency proceedings do not violate due process even though they deny juvenile right to jury trial).

206. See, e.g., *In re A.M.H.*, 447 N.W.2d 40, 44 (Neb. 1989) (finding that institutional placement of minors was remedial and not punitive); *In re Eric J.*, 601 P.2d 549, 554-55 (Cal. 1979) (stating that purpose of adult confinement is punitive and juvenile commitment is remedial).

207. *State v. Schaaf*, 743 P.2d 240, 250 (Wash. 1987). The court based its ruling that the system remained rehabilitative on greater flexibility in juvenile proceedings and lesser collateral consequences of a finding of guilt. *Id.* This reasoning is suspect because it relies on an enervated understanding of rehabilitation. Withholding adverse consequences merely renders a system more lenient; it does not make it rehabilitative. Reducing the burden of a finding of guilt is a helpful, but not sufficient, condition for operating a rehabilitative system. Services and support must be provided before a system can be considered rehabilitative, as that word is commonly

the right to equal protection are guaranteed by the Federal Constitution, such rulings reinforce a claim for rehabilitative care under state law. It cannot be, or at least should not be, significant that the system is rehabilitative when this undermines children's claims, yet insignificant when it bolsters them. However, judicial reluctance to look behind the legislative declaration of a rehabilitative purpose and see the reality of children's experiences in inadequate facilities often thwarts efforts to make the promise a reality.

Although there is no consensus concerning the programs a state should or must operate to fulfill its obligation of adequate rehabilitative care,²⁰⁸ it is universally acknowledged that states must offer education services, both general and vocational. The importance of education to children's development and their life chances is obvious. All states require children to attend school up to a certain age. Parents who fail to ensure that their children attend school may be subject to criminal prosecutions,²⁰⁹ neglect proceedings,²¹⁰ or the reduction of welfare benefits.²¹¹ States exercising *parens patriae* authority over delinquent children have the same responsibility for ensuring that the children in their care receive educational services.

The general duty to provide rehabilitative services to children in state custody necessarily includes the obligation to provide education.²¹² Specific statutory provisions granting general rights to services would necessarily include a right to receive education. Consent decrees governing juvenile justice systems contain specific provisions concerning the education of detained youth.²¹³ State regulations often also contain standards for the education which delinquent children in state care are to receive.²¹⁴ While education is

understood. Imagine two homes with grave structural problems. The city orders the first to be demolished with a wrecking ball. The second is allowed to stand for as long as it can. The housing department would be ridiculed if it claimed that the second home was thereby rehabilitated. As for the greater flexibility or informality of juvenile court proceedings, few significant differences have survived *In re Gault*.

208. A tentative consensus is forming around research showing that particular services (e.g., family-based therapy and cognitive-behavioral therapy) are more effective at preventing recidivism than some traditional services (e.g., individual and peer-group counseling). Barry Krisberg et al., *What Works With Juvenile Offenders*, 10 CRIM. JUSTICE 20, 21-22 (1995).

209. See *City of Akron v. Lane*, 416 N.E.2d 642, 645 (1979) (upholding conviction of parent for violating compulsory education law).

210. See *In re B.B.*, 440 N.W.2d 594, 598 (Iowa 1989) (upholding conviction of parent who provided home schooling for daughter without school district approval).

211. Wis. Admin. Code § HSS 201.195 (Feb. 1995).

212. See *Tommy P. v. Board of Comm'rs*, 645 P.2d 697, 704 (Wash. 1982) (finding that the only way to reconcile state's compulsory education law with rehabilitative aspects of Juvenile Justice Act of 1977 was to read both together as requiring provision of a program of education in juvenile detention facilities). The court recognized that children in detention are "in urgent need of education" and concluded by stating that "[w]hile the provision of education in detention may not be essential to achieve the punishment (accountability) policy of the Act, it is certainly necessary to achieve the rehabilitation . . . policy." *Id.*

213. This is true of consent decrees governing the juvenile justice systems of the District of Columbia and Arizona.

214. See, e.g., TEX. ADMIN. CODE tit. 37, § 87.31 (requiring all Texas Youth Commission schools to be accredited by Texas Education Agency).

not a fundamental right under the Federal Constitution, children in detention may have claims under the Due Process or Equal Protection Clauses of the Fourteenth Amendment if they are denied the education which state law promises.²¹⁵ Many state constitutions require the legislature to provide a system of free schools wherein all the children of the state may be educated.²¹⁶ Some variation from the program provided in the public schools would be acceptable if necessary to accommodate the state's security or disciplinary concerns. Deficiencies which cannot be justified by such concerns are illegitimate and should not be tolerated. There are few reported opinions on this subject, due in part, no doubt, to the fact that few people would claim with a straight face that children in state custody should not be educated.²¹⁷

Delinquent children in state care are also entitled to receive special education and related services pursuant to the Individuals with Disabilities Education Act (IDEA).²¹⁸ Under IDEA, all states receiving federal assistance under the statute are obligated to identify all disabled children (as defined by the statute) and provide them with a free appropriate public education, including special education and related services.²¹⁹ Special education means specially designed instruction to meet the unique needs of the disabled child.²²⁰ Related services means "such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education."²²¹ Congress has expressly listed state agencies such as departments of mental health and welfare and correctional facilities as

215. See *Donnell C. v. Illinois State Bd. of Educ.*, 829 F. Supp. 1016, 1018 (N.D. Ill. 1993) (holding that school aged pre-trial detainees who alleged denial of adequate education services stated due process claim).

216. See, e.g., N.Y. CONST. art. XI, § 1 (providing for "maintenance and support of free common schools"); N.J. CONST. art. VIII, § 4, para. 1 (same).

217. See *Tommy P. v. Board of County Comm'rs*, 645 P.2d 697, 704 (Wash. 1982) (en banc) (reconciling education and delinquency laws). Some unreported opinions, along with several of the major reported pre-*Romeo* "right to treatment" cases are referred to in MARK I. SOLER ET AL., REPRESENTING THE CHILD CLIENT 2-63 n.131 (1995).

218. 20 U.S.C.A. § 1400 (1995).

219. 20 U.S.C.A. § 1412(1)(b)-(c) (1995). One meta-analysis of studies concerning the number of children in the juvenile justice system who would be classified as disabled within the meaning of IDEA has estimated that 12.6% of juvenile offenders are mentally retarded, and 35.6% have learning disabilities. Pamela Casey & Ingo Keilitz, *Estimating the Prevalence of Learning Disabled and Mentally Retarded Juvenile Offenders: A Meta-Analysis*, in UNDERSTANDING TROUBLED AND TROUBLING YOUTH 82, 89, 93 (Peter Leone ed., 1990). There were not enough studies under review in this meta-analysis concerning emotionally disturbed youth to enable the authors to estimate the prevalence of this disability among juvenile delinquents. *Id.* at 85. Professor Peter Leone has stated that 30-50% of all children in confinement have been enrolled in special education prior to their detention. Professor Peter Leone, Address at District of Columbia School of Law and the Robert F. Kennedy Memorial Foundation Symposium (June 24, 1995).

220. 20 U.S.C.A. § 1401(a)(16) (1995).

221. 34 C.F.R. § 300.16 (1994). The list of related services found here is not intended to be exhaustive but is still quite lengthy. It covers virtually all aspects of a child's life and is a potent weapon for advocates on behalf of children with disabilities in or out of the juvenile justice system.

within the statute's scope.²²² Juvenile justice systems in any state receiving federal funds under IDEA must identify disabled children in their care, promptly devise an appropriate plan for them, and provide the necessary services. Studies and litigation from across the country have revealed grave deficiencies in all of these areas.²²³

The cases and statutes discussed in this section demonstrate that delinquent children have rights to rehabilitative care based on state law. These rights are distinct from any constitutional claim and retain their force even within a system which avowedly punishes youths. This right includes the right to receive adequate education services, but goes much further, reaching all types of care necessary to fulfill the states' promise of rehabilitation, training, and substituted parental care.

VI. THE INADEQUACY OF CARE AND SERVICES TODAY

Despite the clear command of the statutes and cases discussed above, children in juvenile justice systems across this country do not receive services which are even minimally adequate to meet their needs.²²⁴ As discussed earlier, education is the one service which every child will certainly need while in state care. Professor Peter Leone, an education professional with experience in many juvenile justice systems, recently related that a detention center in Kentucky he visited last year offered an educational program which consisted of one-and-a-half to two hours a day of instruction by a single teacher who was not affiliated with any educational authority.²²⁵ This sad reality belied the law of that state, which promises delinquent children a "right to treatment reasonably calculated to bring about an improvement in [their] condition."²²⁶ A similar situation exists in detention centers throughout Georgia, where a single teacher attempts to educate a population of fifty youths ranging in age from ten to seventeen. The extent of the damage caused by such

222. 34 C.F.R. § 300.2(b) (1995). The Civil Rights Division of the Department of Justice submitted a Statement of Interest in the *Alexander S.* litigation expressing the opinion of the United States Department of Education that the obligations of IDEA clearly apply to all juvenile facilities, including short-term detention facilities. *Alexander S. v. Boyd*, 876 F. Supp. 773, 802 (D.S.C. 1995). Statement of Interest on file with author.

223. See, e.g., Peter E. Leone, *Education Services for Youth with Disabilities in an State-Operated Juvenile Correctional System: Case Study and Analysis*, 28 J. SPECIAL EDUC. 43, 56 (1994) (stating that "'turf protection' and an unwillingness to challenge practices in other state agencies result in less-than-adequate monitoring and support for special education in correctional facilities").

224. This discussion necessarily relies on anecdotal evidence. A systematic review of the needs of confined juveniles and the availability and effectiveness of programs to meet them has not yet been done. See generally DALE PARENT ET AL., *CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES* (1994) (calling for such review).

225. Conversation with Professor Peter Leone, Department of Special Education, University of Maryland.

226. KY. REV. STAT. ANN. § 600.010 (Michie/Bobbs-Merill 1970). This dire situation also violated state regulations which require that education programs in detention centers be "designed to assist detained juveniles in keeping up with their studies." 500 KY. ADMIN. REGS. § 6:150 (1987).

an inappropriate program is immense: hundreds of youths pass through these facilities every year, with the average stay lasting eight months.²²⁷ There can be no doubt that rather than providing an opportunity to make up lost ground, these facilities cause the skills the youths bring with them to deteriorate. A site visit by representatives of the Justice Department to a facility in Wayne County, Michigan revealed that "twenty-one percent of the population were out of school the entire day, either watching television, sitting silently, or locked in their rooms."²²⁸ One student had been excluded from school for two weeks for wearing his hair in dreadlocks.²²⁹ There is little doubt that a parent so negligent in looking after a child's education would face sanctions from at least one court, if not two or three.²³⁰

Regrettably, wholesale child neglect by states often proves resistant to even the strongest efforts at reform. The District of Columbia juvenile justice system operates under a consent decree entered in 1986.²³¹ The decree is comprehensive, specifying population and staffing levels, imposing a deadline for individual assessments of children's needs, setting standards for education, medical care, recreation services and other programs, and most ambitiously, calling for the creation of a continuum of care centered around the greatly expanded use of community-based programs and facilities. The judge presiding over the case issued his first order to force compliance with the terms of the decree a year after it was entered. The judge captioned this first order, which called for the creation of specific vocational programs for committed youths, "Memorandum Order A." The judge left the case in 1994 when he was appointed to a seat on the United States District Court for the District of Columbia. By the time he did so, he had issued his eighteenth compliance order, "Memorandum Order R."²³² Along the way from A to R,

227. Mark Silk, *Stopping Juvenile Crime DCYS needs 'more of everything,'* ATLANTA CONSTITUTION, Sept. 23, 1994, at D5. In May 1995, one of these facilities added sixty residents and the one full-time teacher had two part-time teachers assisting. Mark Silk, *Youth's Suicide Highlights Problems at DeKalb Facility*, ATLANTA CONSTITUTION, May 9, 1995, at C4.

228. DETROIT FREE PRESS, Dec. 23, 1994, at 1B. The extent to which state facilities operate outside the law is frightening. The state social services agency refused to certify the Wayne County facility as suitable for the care of children. If it were a private facility, workers said, it would surely be shut down. DETROIT FREE PRESS, Mar. 2, 1994, at 1A.

229. *Id.*

230. Mental health services may be almost as critical as education to caring for children in confinement, yet an editorial in the July 3, 1991, *Seattle Times* reported that the "superintendent of Green Hill School noted that for much of the past year only one psychologist served the entire statewide system." *Task Force Study—Treatment is Lacking in State Juvenile System*, SEATTLE TIMES, July 3, 1991, at A6. Although a successful rehabilitation program need not rely on heavy doses of psychological counseling, the experience of confinement in dysfunctional institutions can be so traumatic that the services of a psychologist will frequently be needed. See PARENT ET AL., *supra* note 224 (listing suicide prevention as one of the areas most in need of improvement in juvenile facilities nationwide).

231. Jerry M. v. District of Columbia, C.A. No. 1519-95 (IFP) (consent decree entered July 24, 1986).

232. The judge who assumed jurisdiction over the case has taken to captioning his orders with numbers. Thus, the District will be spared the embarrassment of receiving Memorandum Order Z.

the judge visited and revisited issues of population levels, certification of teachers, suicide prevention, medical care, and the continued failure of the city to develop the continuum of care promised at the very beginning. The following quote from Memorandum Order H suggests that even judicial supervision often will be insufficient to move a juvenile justice system into conformity with recognized standards: "Defendants have, since the inception of the Consent Decree, responded to deficiencies in medical care only when pressure was brought to bear from without. When there was no outside threat, defendants have given every indication that they were satisfied with a clearly substandard and ineffective system of medical care."²³³

While sustained improvement in medical care services followed the issuance of Order H,²³⁴ little progress has yet been made in terms of establishing the continuum of care or improving the educational and vocational programs in or out of the District's juvenile facilities.²³⁵ Frustrated with continued non-compliance, the court warned that it would not "stand idly by while the legal fiction upon which the system is premised—*parens patriae*—degenerates into both tragedy and farce."²³⁶ The court has not merely threatened city officials in the effort to get them to meet their obligations toward the children in their care; it has imposed staggering monetary sanctions²³⁷ and appointed Special Masters for specific issues.²³⁸ Nevertheless, the system is an abject failure.²³⁹ Instead of devoting resources to the design and implementation of an effective system centered on community-based programs, city leaders have shuffled papers and personnel within the flawed traditional structure. The result is that the city has provided few services to any of its delinquent children, those confined or those nominally supervised in the community. This repeated failure has been compounded by the exceptional

233. Memorandum Order H, Sept. 28, 1989, at 2. In Memorandum Order I, the court reviewed the city's compliance with the teacher staffing provisions of the decree. The consent decree called for compliance by September, 1987. The evidence before the court showed that the city did not seek permission to hire until February, 1990. Once again, the judge concluded, this recent hiring, with the treat of contempt imminent, showed that "defendants act swiftest when subject to external pressure."

234. See Memorandum Order L.

235. A panel of experts reported to the court that "[c]ompliance is so low on the city's agenda that [the continuum of care] will never be implemented by YSA (the Youth Services Administration) and needed educational and vocational services will never be provided by DCPS (the District of Columbia Public Schools)." Memorandum Order J, Aug. 21, 1991 (quoting Report of Aug. 1990).

236. Order J, at 65.

237. *Id.* at 69.

238. Order J, Order L.

239. For a discussion of a much more successful experience with litigation-driven reform in a juvenile justice system, see Dale Sanniti, *Litigation as an Instrument for Change in Juvenile Detention: A Case Study*, 39 CRIME AND DELINQ. 1 (1993).

expenses it has brought on in the form of contempt fines and plaintiffs' lawyers' fees.²⁴⁰

The District of Columbia is not unique in this regard. Other jurisdictions have experienced the same problems, with the same causes.²⁴¹ Three years ago, the presiding judge of the Juvenile Division of the Superior Court of Maricopa County, Arizona, wrote that "[t]he major crisis in the juvenile justice system in Arizona today, at both the state and county levels, is the inability to provide appropriate treatment and rehabilitative services to the juveniles and families in the system."²⁴² The judge traced this inability to the lack of resources allocated to the system, a problem which was getting worse as time passed. Rather than money, the state legislature was addressing the problem with nomenclature. In 1990, responsibility for juvenile justice programs was taken from the Department of Corrections and given to a newly-created Department of Juvenile Corrections. In 1991, the name of the new department was changed to the Department of Youth Treatment and Rehabilitation, "presumably as a symbolic reaffirmation of the treatment and rehabilitative focus of the juvenile justice system."²⁴³ With the new name came a budget cut and a further deterioration of services.²⁴⁴ In 1993, litigation involving one Arizona facility resulted in a consent decree.²⁴⁵ According to the plaintiff's lead attorney, the education and special education services at the facility have vastly improved since the decree was entered.²⁴⁶ These improvements may soon be meaningless, as Arizona's governor has vowed to abolish the juvenile justice system entirely, diverting minor offenses to neighborhood resolution centers and prosecuting all other child offenders as adults in criminal court.²⁴⁷

240. Memorandum Order J, at 20. The Memorandum stated: "the biggest impediment to compliance . . . is the city's refusal to allocate adequate fiscal and human resources for the continuum of services ordered by the court." *Id.*

241. See, e.g., *In re C.C.*, 878 P.2d 865, 869 (Kan. Ct. App. 1994) (questioning whether agency's placement procedure serves children's interests, while recognizing that dubious procedure "has inevitably arisen because insufficient funding and inadequate space" have limited agency's ability to provide needed care); *In re Daniel West*, 427 S.E.2d 889, 892 (N.C. Ct. App. 1993) (affirming trial court's order even though trial court stated that funding and programming limitations left it unable to issue a dispositional order which satisfied statutory command because it could not meet needs of child or interest of community).

242. James E. McDougall, *Crisis in the Juvenile Justice System*, ARIZ. ATTORNEY, Oct. 1992, at 23.

243. *Id.* at 25.

244. *Id.*

245. See David Lambert, *Johnson v. Upchurch Victory Brings Bid Reforms in Arizona Juvenile Institutions*, XIV YOUTH LAW NEWS 1 (1993).

246. Conversation with David Lambert, National Center for Youth Law (July 1995). Mr. Lambert attributed the educational improvements in part to the decision of the legislature to create a unitary school district to administer education programming at all juvenile facilities.

247. See Pat Flannery, *Governor: Let Voters Reform Youth Justice*, PHOENIX GAZETTE, Apr. 19, 1995, at B1. The governor had first made the call for abolition in his January 1995 State of the State address. The article cited here described his renewed call, made at a ceremony signing a bill changing the name of the Department of Youth Treatment and Rehabilitation back to the Department of Juvenile Corrections.

At the time the lawsuit was filed in *Alexander S. v. Boyd*,²⁴⁸ South Carolina offered very few programs other than educational programs. The *Alexander S.* court remarked that "unsuccessful efforts at rehabilitation stem primarily, if not exclusively, from the lack of adequate funding to devise and implement programs that will allow juveniles to correct their behavior while they are at DJJ facilities."²⁴⁹ The court went on to say that "[w]ithout minimally adequate programming, the agency is simply warehousing the juveniles and ignoring the statutory purpose of their confinement."²⁵⁰ The court seemed pleased to note that the state had introduced several new programs in response to the litigation and that preliminary data indicated that the youths in those programs behaved better in the institution and had greater success in the community than those who were not in the programs.²⁵¹ These results demonstrate that meaningful progress can be made while children are in state care. It is absurd that litigation is required to stimulate a response, and it is lamentable that this institutional child neglect is so widespread, and, in many places, so resistant to any efforts to remedy it.

VII. THE ROLE OF COURTS IN ENSURING THAT CHILDREN RECEIVE EFFECTIVE CARE AND SERVICES

For more than twenty years, at least since *Kent v. United States*²⁵² and *In re Gault*,²⁵³ courts from across the country have voiced frustration with the inadequacy of the rehabilitative programs offered by the juvenile justice system, which renders dispositional orders in individual delinquency cases little more than wishful thinking.²⁵⁴ Trial court judges feel this frustration most acutely. One has written that "[o]ne of the most frustrating experiences for me, as a judge, is to have my hands tied; that is to be unable to take the appropriate action in a particular case, whether it is due to state law, lack of funds, or simply lack of the necessary program."²⁵⁵ Another judge, chafing at the paucity of rehabilitative options offered by the state agency but restrained by local precedent from ordering an alternative, refused to certify, as required by statute, that the disposition ultimately ordered would serve either the public interest or the needs of the child.²⁵⁶ The Illinois judge presiding over the cases of the twelve- and thirteen-year-old boys convicted of the murder of a five-year-old reluctantly ordered the boys to youth prison

248. 876 F. Supp. 773 (D.S.C. 1995).

249. *Id.* at 781.

250. *Id.* at 790.

251. *Id.*

252. 383 U.S. 541 (1966).

253. 387 U.S. 1 (1967).

254. See, e.g., *In re Welfare of J.E.C.*, 225 N.W.2d 245, 250 (Minn. 1975) (remanding case for further fact-finding concerning agency's decision to operate no programs designed for hardcore, sophisticated, and aggressive delinquents).

255. Judge Paul R. Davis, *The Balanced Approach for Juvenile Justice: A Challenge from the Bench*, in *JUVENILE PROBATION: THE BALANCED APPROACH* 51 (Dennis Maloney et al. eds., 1988).

256. *In re Daniel West*, 427 S.E.2d 889, 892 (N.C. Ct. App. 1993).

but scheduled an extraordinary post-disposition hearing at which the state must present its plan for meeting the boys' needs.²⁵⁷ Experience in the District of Columbia has provided countless examples of judges straining to guide the care of delinquent children despite statutory limitations on their authority to do so. Under local law, judges can forbid the agency from releasing a committed child without court approval,²⁵⁸ but they lack authority to direct the day-to-day program of a committed child.²⁵⁹ Many judges schedule review hearings in which they assess the performance of both the child and the agency during the commitment before deciding whether to authorize the child's release. Actually, judges do much more than simply assess. Sometimes, they issue orders of dubious legality, and other times, they merely apply the pressure of their displeasure, in the hope of prompting effective care and supervision for the child.

Allowing courts to engage in meaningful post-disposition review of agency care would provide a useful, albeit quite limited, check on administrative discretion. Several states provide that the juvenile court's continuing jurisdiction over delinquency cases authorizes it to continue to play a role in the decisions as to what is done for the child.²⁶⁰ The cases and statutes surveyed reveal great differences in the scope of a court's post-commitment authority. The West Virginia Supreme Court in *Trent* appears to suggest that the court can, in appropriate circumstances, revisit the case as if it were back at the original disposition hearing.²⁶¹ Cases in Montana and Alaska suggest that the court should review the agency's program for the child under an abuse of discretion standard, approving any reasonable professional decision.²⁶² The Montana statute authorizes the court to "revoke or modify" a

257. Gary Marx, *Kid Killers Ordered to Prison*, CHI. TRIB., Jan. 30, 1996, at 1.

258. See D.C. CODE § 24-805 (1985) (providing youth offender an appeal from a finding of the Director of Corrections that youth will derive no further benefit from treatment).

259. See *In re J.J.*, 431 A.2d 587, 591 (D.C. 1981) (stating that agency has exclusive supervisory responsibility for juvenile and court relinquishes authority to determine appropriate rehabilitative measures once it transfers custody to agency).

260. See, e.g., ALASKA STAT. § 47.10.080(f) (1995) (stating that court may frequently review all placement orders to determine best interests of minor and public); MONT. CODE ANN. § 41-5-523(4) to (5) (1993) (providing courts with authority to order medical and psychological evaluations and authority to determine financial ability of youth's parents to pay for evaluations); W. VA. CODE § 49-5-2 (1995) (discussing requirements for continuing jurisdiction of court in juvenile cases); *In re B.S.M.*, 767 P.2d 319, 320 (Mont. 1989) (holding that court is responsible for choosing disposition alternatives); *State v. Trent*, 289 S.E.2d 166, 177 (W. Va. 1982) (stating that court is required to review child's history to determine appropriate treatment plan); *State v. S.H.*, 877 P.2d 205, 216 (Wash. Ct. App. 1994) (relying on treatment recommendations when considering disposition); cf. *In re J.A.G.*, 443 A.2d 13, 24 (D.C. 1982) (holding that District of Columbia juvenile court lacks authority to intervene after issuing order committing custody of delinquent child to Department of Human Services); *In re J.M.W.*, 411 A.2d 345, 349 (D.C. 1980) (same).

261. See *Trent*, 289 S.E.2d at 174 (stating that court may retain custody of juvenile if director of facility determines rehabilitation impossible).

262. See *B.S.M.*, 767 P.2d at 320 (stating that because decision of placement rests with Department of Health and Social Services, court reviews decision only for abuse of discretion); *Department of Health & Social Servs. v. A.C.*, 682 P.2d 1131, 1134 (Alaska Ct. App. 1984)

commitment order where appropriate.²⁶³ It is not clear what power an Alaska court can exercise if it determines that the agency has abused its discretion in its efforts to care for the child. The Washington Court of Appeals has called for extremely deferential review, directing courts to deny a child's petition without a hearing unless the agency concedes, or the record makes clear, that no meaningful treatment is being provided.²⁶⁴

The Washington Court of Appeals expressed concern that any less deferential standard would result in judges "micro-managing" the agency.²⁶⁵ This concern is a very real one, as described below, but such severe restrictions on judicial review render children's rights to rehabilitative services meaningless in all but the most egregious cases. Such cavalier disregard for the needs and rights of the many children in confinement who receive care barely distinguishable from total neglect—yet far short of the substituted parental care that the law promises—is not required by any limitations on the role of courts. The abuse of discretion standard announced by the Alaska Court of Appeals in *Department of Health & Social Services v. A.C.*²⁶⁶ preserves respect for agency prerogative and expertise without placing all but the most grotesque misfeasance beyond judicial scrutiny. This deferential standard would not likely result in courts upsetting agency decisions in very many instances. Legitimate administrative judgments would be respected. However, the very prospect of the review hearing provides a powerful incentive for the agency to consider whether it is meeting its obligation to the child. The need to justify the program to an official outside the agency forces agency administrators to examine their position from the perspective of someone who is not indoctrinated with the agency's own imperatives and protocols. In a recent article addressing the similar overlap of authority between judges and administrative agencies in child abuse and neglect cases, Bruce Boyer proposed a prudential rule for courts to apply in deciding when to defer to agency discretion and when to exercise jurisdiction.²⁶⁷ Such a standard would create a far more active role for courts in deciding what care a child receives.

The scope of judicial authority to monitor or direct the rehabilitative care of a child can have considerable importance in particular cases. Regularly faced with the herculean task of moving an unresponsive bureaucracy, Boyer suggests a system where a lawyer need only persuade one decision-maker, the judge, about the needs of one child, the client, in one case, the

(stating that court will "not second guess . . . professional treatment decisions" absent a showing of clearly inadequate treatment).

263. MONT. CODE ANN. § 41-5-523(5).

264. *S.H.*, 877 P.2d at 216.

265. *Id.*

266. 682 P.2d 1131, 1134 (Alaska Ct. App. 1984).

267. See Bruce Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377, 426 (1995) (suggesting three issues germane to court's decision to preempt administrative agencies: (1) nature of interest at stake and does dispute compel court to safeguard that interest; (2) harm to child if planned action goes forward; and (3) preclusion of review if court fails to review agency's planned decision).

one before the court. On any given day, before a judge with the authority to order the provision of specific services, a lawyer can hope to bring about meaningful change in the life of that client.²⁶⁸ However, giving individual judges the authority to order services in individual cases cannot increase the agency's ability to provide appropriate care to all of its children. In many respects, this is a zero-sum game, wherein the substance abuse treatment slot given by judicial fiat to the first child through the door in Courtroom 1 is not available to any other children in that courtroom or in any other courtroom that day, regardless of which one has the most urgent need. Judges reviewing particular cases cannot create more slots. Meaningful judicial review, such as that suggested by Boyer, or the A.C. court, can, however, make sure that the agency is in fact exhausting all available appropriate resources in every individual case.²⁶⁹ A likely side benefit of such a system would be that legislators would get accurate feedback concerning the levels at which they are funding rehabilitative programs. Agency representatives who are forced to explain to judges why they cannot provide obviously needed services will have an incentive to report their difficulties to their supervisors, who will be prompted in turn to let legislators know that they need the money to satisfy the judiciary's daily demands.

VIII. LOOKING FOR HOPE IN RELATIONSHIPS RATHER THAN WORDS

Despite a century of legislation, years of litigation, and daily representation by lawyers in individual cases, delinquent children in state custody throughout the country do not receive the care and assistance needed to enable them to develop into competent, law-abiding, contributing members of their communities. In light of this history and the clamor of contemporary politicians battling furiously to prove themselves the toughest on children who have broken the law, it seems almost futile to issue a call for more effective programming for such children. Nevertheless, current research and new program models not only compel us to make such a call, they point the way to a more convincing understanding of the relationships among delinquent children, their families, juvenile courts, and communities. This new understanding moves beyond the Progressive juvenile court of the 1890s as well as the "just desserts" model of recent years.

The Progressive notion that children could be removed from their homes, improved under the benevolent eye of the *parens patriae* juvenile court, and set free to live out their days in peace and happiness was hopelessly simplistic. Its fatal flaw was not its assumption that children who have misbehaved could be directed toward better behavior. Current research discussed below validates that belief. What makes the Progressive model unten-

268. In addition to providing for meaningful review, states could fortify courts' ability to make sure that agencies meet their obligations to children in state care by specifying in the disposition statute some of the services which should be generally available and giving courts the authority to order those services where appropriate.

269. See Boyer, *supra* note 267, at 426 (discussing judicial review).

able today is its focus on the child, as the subject of the court's care, without adequate regard for the complexity of the child's relationship to his family and the place of the child and the family within the community. Children are born into and raised by families—particular families—and those families live in communities, which offer a mixture of danger and opportunity to all members. Society's response to a child's delinquency must address the fact that, even if removed, the child will return to his family and community. The exercise of juvenile court jurisdiction must recognize these bonds and draw on the strengths and compensate for the weaknesses within families and communities.

A juvenile court cannot hope to solve such a complicated problem by the application of "treatment," like a doctor prescribing pills. Continued usage of the term "treatment," which was initiated by the Progressives and relied on by the modern juvenile justice reformers, can only generate confusion. The Progressives employed the term as an analogy: courts were expected to respond to delinquency just as doctors respond to illness: by identifying and treating the cause. In the heyday of constitutional juvenile justice reform, some advocates referred to treatment as a methodology: children's behavior was to be corrected via psychotherapeutic care.²⁷⁰ Neither usage can be supported today. It is extremely difficult to identify a specific cause for any particular child's delinquent behavior. Experts have achieved a near-consensus that individual psychotherapy is ineffective with many delinquent children.²⁷¹ Certainly, such care should be provided to those children who need it. However, the states have an obligation to provide care for all their delinquent children, and little of the care needed would qualify as "treatment" within a medical model. All children can be taught how to handle difficult situations, relate with other people, and exercise good judgment. They all can increase their fund of knowledge, develop learning skills, and cultivate vocational aptitudes. These are the specific skills which parents are responsible for facilitating while children are in their care. They are the concrete skills which, at a minimum, the juvenile justice system, in its *parens patriae* role, must ultimately provide for children in state care. While this list is somewhat prosaic, it would be a considerable advance if the juvenile justice system began to make widespread progress in any of these areas.²⁷²

270. Much of the right to treatment litigation addressed many other issues, as discussed in the earlier parts of this article. Moreover, plaintiff's attorneys were wise to phrase their claims in terms which were taken from the history of the juvenile court and the purpose clauses of the existing statutes. However, given the dubious validity or the limited scope of a constitutional right to treatment today, advocates for children gain little by continuing to employ this outmoded term.

271. JOY DRYFOOS, *ADOLESCENTS AT RISK* 145 (1990) ("Earlier delinquency prevention efforts expected that individual psychotherapy would 'cure' delinquents of criminal tendencies. This did not prove to be the case.").

272. The designers of the Balanced Approach, a relatively new concept in juvenile justice system design, have also forsaken the term "treatment." They emphasize "competency-building" as one of the system's essential goals. They define competency as "the capacity to do something well that others value" and list work, cognitive skills, decision-making abilities, service, and

Not only is "treatment" inaccurate as a description of what juvenile courts can or should do, the medical model — whether analogy or method — is incompatible with the harshest modern juvenile justice legislation. Several states have recently introduced the concept of mandatory minimum terms of confinement into the juvenile justice system.²⁷³ Such a procrustean rule is totally inconsistent with the medical model. Under a medical model, once the condition causing the child to offend has been identified and removed, further confinement is unwise and unjustified. A doctor would never suggest, let alone insist, that a patient continue a course of medication beyond the time when the infection has been conclusively treated. The skills discussed above are skills which states can and should develop throughout a child's term of confinement or supervision, whatever its duration.²⁷⁴

The call for abandoning the term "treatment" should not be interpreted as a rejection of the traditional juvenile court mission of providing care which aids delinquent children in growing up to be more capable of controlling their own behavior, caring for others, and contributing to their community. To the contrary, we seek to open the field wider to those programs which are currently achieving measurable success in attaining these goals in the face of the conventional wisdom that "nothing works."²⁷⁵ While traditional individual and peer-group counseling have not had much effect on helping children to change their behavior,²⁷⁶ several other programs have produced beneficial results. The most promising programs are those which are family-oriented

learning as important competencies which the juvenile justice system should help children develop. Training materials and background research provided by the project designers are on file with the authors. This approach is noted with strong approval in *Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System: Final Report*, 20 WM. MITCHELL L. REV. 595 (1994). The Office of Juvenile Justice and Delinquency Prevention has called this project a "promising paradigm of juvenile justice." OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, BALANCED AND RESTORATIVE JUSTICE: PROGRAM SUMMARY (1994).

273. ALA. CODE § 12-15-71.1 (1975 & Supp. 1994); COLO. REV. STAT. § 19-3-113 to 19-3-115. The Alabama Supreme Court has very recently stated that its juvenile code is "not punitive but rehabilitative." *Ex parte S.F.R.*, 598 So.2d 1006, 1008 (Ala. 1992). Many legislatures have recently expanded the states' authority to prosecute children in criminal court. This removes those children from the rehabilitative care promised in the juvenile justice system. However the juvenile justice system is conceived, it will not reach children subject to criminal prosecution, except to the extent that as juvenile justice systems become more effective, judges and prosecutors will use their discretion to channel more cases to the juvenile justice system.

274. The authors of this article do not endorse mandatory minimum terms of commitment. We strongly believe that children should neither be confined nor supervised beyond the period where they pose a danger to the community. Nevertheless, mandatory minimums are an important recent development in juvenile justice, and any attempt to describe the current system must acknowledge their existence.

275. Doubts about the effectiveness of rehabilitative programs were prominently raised in 1974. See Robert Martinson, *What Works? Questions and Answers About Prison Reform*, in THE PUBLIC INTEREST (1974). This and other research questioning the effectiveness of rehabilitative efforts are discussed in BARRY FELD, JUSTICE FOR CHILDREN 268-69 (1993).

276. Barry Krisberg et al., *What Works with Juvenile Offenders*, 10 CRIM. JUST. 60 (1995). This same conclusion is also reached in a thorough review of research data prepared this year. RICHARD A. MENDEL, AMERICAN YOUTH POLICY FORUM, PREVENTION OR PORK? A HARD-HEADED LOOK AT YOUTH-ORIENTED ANTI-CRIME PROGRAMS 22-23 (1995).

and address communication and problem-solving skills of the children and other family members. Such programs "have demonstrated strong and lasting positive effects"²⁷⁷ which have been summarized as follows by the Office of Technology Assessment:

Several studies have shown that, in the short term, family systems approaches cut recidivism rates by half in comparison with more traditional forms of psychotherapy. . . and no-treatment groups and have a greater impact on child and family functioning than other types of therapy.²⁷⁸

A second class of successful programs emphasizes cognitive and behavioral skills. These programs differ from traditional individual and group counseling in that they focus the counselor and the child on specific social skills such as self-control, moral reasoning, and problem-solving. Again, their success has been demonstrated by changed behavior patterns for those children who receive such services.²⁷⁹

These programs are likely to be much more effective than boot camps and other programs which are based on the notion that offenders can be "shocked" into changing their behavior.²⁸⁰ If the prospect of negative consequences for failure was enough to change delinquent children's behavior, we would expect to see greatly reduced recidivism among those who have been confined. What is missing from these negative-reinforcement strategies is sufficient opportunity for youths to develop the skills that they will need in the settings where they eventually will live (i.e., family, school, community, work place) and where they will have to make the difficult decisions that will take them away from the troubles of their past. Unless steps are taken to help youths translate the discipline and aptitudes learned at boot camp into their homes and neighborhoods, the drills will be no more than wasted sweating and shouting.

Even the District of Columbia, the site of the protracted failure of juvenile justice reform described above, has been the site of promising innovation of late. At long last, a model of community-based programming has begun, under the auspices of the Children's Trust Neighborhood Initiative. This organization enlists children and their families in "family life management planning" which is distinguished from traditional case planning in that "it takes an all-encompassing view of providing support, services, and resources that address the needs of the high-risk youth, their family, household mem-

277. MENDEL, *supra* note 276, at 20.

278. *Id.* at 20 (quoting Office of Technology Assessment). See also Albert R. Roberts & Michael J. Camasso, *The Effect of Juvenile Offender Treatment Programs on Recidivism: A Meta-analysis of 46 Studies*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421 (1991).

279. MENDEL, *supra* note 276, at 21; Krisberg et al., *supra* note 276, at 58.

280. Recent studies have found that promising strategies exist even for children who have been involved in serious misconduct or have been offending over a period of years. See OFFICE OF JUVENILE JUSTICE DELINQUENCY PREVENTION, *supra* note 272, at n.145; Charles M. Borduin, *Innovative Models of Treatment and Delivery in the Juvenile Justice System*, 23 J. CLINICAL PSYCHOL. 19, 54 (1994); J.A. Fagan, *Treatment and reintegration of violent juvenile offenders: Experimental results*, JUST. Q. 7, 233-63 (1990).

bers, and significant peers, in their homes, schools, and communities.”²⁸¹ It did not take any new legislation to bring this program about. What it took, regrettably, was years of fines for non-compliance with court orders, and the hand of a court-appointed monitor to direct the money to people who were not wedded to the old treatment paradigm nor the new punishment craze. All people concerned with meaningful change in the lives of delinquent children should take advantage of this gathering momentum in the social sciences and try to break through the barriers which contemporary politics and media practices have erected between communities and the information about successful rehabilitative programs.

The misallocation of resources into more restrictive confinement instead of more effective institutional and community-based programs results from more than a simple misunderstanding about whether or not such programs work. In many communities, too many people have given up on the notion that offenders, both juvenile and adult, can be and should be reintegrated into the larger community. Too many people reject any connection with the young men and women involved in the juvenile justice system and see the world as divided between offenders (and potential offenders) and victims (and potential victims). The first group, it is widely thought, must be put in secure facilities to assure the safety of the second.²⁸² This desire to remain apart from offenders carries over into a desire to remain apart from the system, to learn how it works, to see how it fails, to see where it wastes the community's financial and human resources. The result is an over-reliance on costly, large, secure institutions which have been proven to be no more effective in terms of public safety than less expensive, smaller, community-based programs. Feeling no investment in the system, citizens will not commit the time to learn about how it might work better nor will they allow the expenditure of money to enable effective programs to succeed.²⁸³

In part, this alienation may be attributable to the failure of the system to address the needs of those who are victims of crimes. The commonly held belief, however valid, that courts are overly concerned with defendants' rights and not sufficiently concerned with victims' rights impedes children's

281. Materials on file with authors. The District of Columbia and several states have also attempted a more coercive approach to achieving parental involvement in the child's care by making the parents subject to the court's jurisdiction, with non-compliance punishable, in some places, by contempt. See D.C. CODE § 16-2320(c) (silent on contempt power); 42 PA. CONS. STAT. § 6310 (explicit contempt power).

282. See *Reactions and Solutions*, in *Symposium: The Unnecessary Detention of Children in the District of Columbia*, 3 D.C. L. REV. 425, 435 (1995) (remarks of Joyce Burrell, then Acting Director of the District Of Columbia's Youth Services Administration, describing resistance to community-based programs). Atlanta has recently experienced similar resistance. See Special Photo Editorial, ATLANTA CONSTITUTION, June 11, 1995, at B6.

283. For a variety of reasons, juvenile courts across the country have been opened to the public in recent years. Laurel Shaper Walters, *States Try To Rewrite Crime and Punishment*, CHRISTIAN SCIENCE MONITOR, Dec. 5, 1995, at 1. Many legislators have supported this reform to deprive children of the shield of anonymity. This development provides an opportunity for all concerned to see whether juvenile courts and agencies are fulfilling their responsibilities.

advocates in their effort to obtain money, facilities, and public support for rehabilitative programs. Efforts to address the legitimate concerns of victims and other fearful, and perhaps skeptical, members of the community without infringing on the constitutional rights of the accused should be encouraged.

One recently developed juvenile justice model takes as its starting point the need to engage all community members, and especially victims, in the response to delinquent behavior. This model, called the Balanced Approach, consists of three major elements: accountability, competency development, and community protection. The designers of this model call its core principle restorative justice, which refers to the imperative of making the victim whole. The goals of the program go far beyond this, however. The model calls for a new relationship among the victim, the offender, and the community. It recognizes the offender's responsibility toward the victim and the community, but also recognizes a reciprocal responsibility on the part of the community toward the offender. This responsibility obligates the community to provide the offender with an opportunity to develop competency in important areas. The model emphasizes providing youths with skills and opportunities related to basic social interactions, educational advancement, employment training, and community service. Its proponents argue that by emphasizing competency development in specific concrete settings which are important parts of the life-course to adulthood, the Balanced Approach renders itself more accountable to the community and the children it serves. If the children do not demonstrate improved ability in the identified areas, then the programs in place are not adequate. The Balanced Approach has been implemented in full or in part in several communities in recent years.²⁸⁴ Like all programs, it should be judged by its effectiveness in meeting the needs of the community as a whole as well as the children charged with offenses. If it proves successful by this standard, it should be expanded.²⁸⁵ Regardless of the fate of this particular model, however, its proponents' insight concerning the importance of designing a justice system which attempts to create a more cohesive community should be incorporated into any future model.

Another important contribution of the Balanced Approach is its emphasis on the ongoing relationship between the child and the juvenile justice system. Having received assistance in developing important skills while in the state's care, the child will be expected to utilize those skills to live a crime-free, productive life. If he does not, despite having been given the opportunity to do so, it is understandable that society would demand a harsher response to a subsequent offense. If, however, the child was never given a

284. Information concerning the Balanced Approach is available upon request from The Balanced Approach and Restorative Justice Project, Florida Atlantic University, 220 S.E. 2nd Avenue, Room 616P, Ft. Lauderdale, FL 33301.

285. The influence of this approach is evident from the new purpose clause to Pennsylvania's Juvenile Code, which states as its purpose the provision of programs "which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed, and the development of competencies to enable children to become responsible and productive members of the community." 42 PA. CONS. STAT. § 6301(b).

meaningful opportunity to utilize his skills, due to circumstances at home or school or in the community, it is equally understandable that an attorney or judge would demand further assistance in creating an environment in which the skills become meaningful. The more specific the discussion is, about just what should be done and by whom, the more likely some agreement can be found among the child, family, caseworker, and judge. This focus on responsibilities and relationships is likely to be more fruitful than a search for a cause or a treatment to cure it. Moreover, this specificity enables the community to assess more readily how the juvenile justice system is performing and whether the causes for its failures lie within the system or elsewhere. If children under state supervision make minimal improvements in reading skills, conflict-resolution, or other behavioral skills, then internal reform would be a top priority. If, however, children do improve their abilities but are thwarted by a lack of opportunity, then the community must examine its own responsibility more closely.

IX. CONCLUSION

In the first century of the juvenile court's existence, providing effective rehabilitative care to delinquent children has proven to be as difficult as it is important. Even in good juvenile justice systems, courts struggle with the limits of their authority and expertise, and agencies struggle to help each child amid the competing claims of other children for the same resources and the clamor of the community for protection from these very same children. In the many dysfunctional juvenile justice systems across this country, these inherent tensions spill over into chaos that deprives children of opportunities and keeps communities fearful. There are no magic words to make these problems go away. Lawyers cannot assert a "right to treatment" and expect judges to nod, administrators to cower, nightmarish conditions to vanish, and effective programs to appear. At most, this once-prominent doctrine forbids only the most horrible abuse or neglect. Other legal arguments discussed in this article may be more robust in theory, but they cannot result in real change unless wedded to the power to appropriate funds or redesign systems. On the other hand, politicians cannot simply call for "punishment" and thereby make delinquent children, their many and various needs, and the problems in their communities disappear. Communities can turn their backs and order more fences, walls, locks, and bars, but the children will still come home someday. If they come home having been uncared for and feeling unwanted, neither they nor the community will ever benefit from their abilities. As the centennial of the juvenile court approaches, we can waste our time looking for answers in constitutions, codes, and courtrooms; or we can instead look closely at our children and ourselves, demand responsibility from both, apply the lessons of successful and failed programs, and have some reason to hope that tomorrow and the next century will be better.

